Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

October Term, 1997

JOE A. MACRI; LOUISE MACRI;
JOE F. MACRI; and ELEANOR MACRI,

Petitioners,

v.

KING COUNTY, a political
subdivision of the State of Washington,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does *Graham v. Connor,* 490 U.S. 386 (1989), require that the remedy of just compensation under the Taking Clause of the Fifth Amendment replace and preclude substantive due process claims under the Fourteenth Amendment based on arbitrary and capricious government interference with property?

2. If claims for relief based on arbitrary and capricious government action interfering with property may only be based on the Fifth Amendment's Takings Clause, is such a claim unripe under *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985) until the property owner seeks compensation under available state procedures?

PARTIES TO THE PROCEEDING

The plaintiffs are Joe A. and Louise Macri, and Joe F. and Eleanor Macri. There are no parent companies or wholly owned subsidiaries. The defendant is King County, a political subdivision of the State of Washington.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINION BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 9

ARGUMENT

I REVIEW SHOULD BE GRANTED TO RESOLVE A SIGNIFICANT AND DIRECT CONFLICT BETWEEN THE CIRCUIT COURTS 9

II BY ASSUMING THAT DUE PROCESS AND TAKINGS CLAIMS ARE FUNGIBLE, THE NINTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION THAT CONFLICTS WITH THIS COURT'S JURISPRUDENCE 17

III THIS COURT SHOULD DETERMINE WHETHER *GRAHAM* CAUSES THE TAKINGS CLAUSE TO REPLACE SUBSTANTIVE DUE PROCESS PROTECTION FROM ARBITRARY AND CAPRICIOUS GOVERNMENT ACTION 24

IV IF SUBSTANTIVE DUE PROCESS NO LONGER APPLIES TO PROPERTY, THIS COURT SHOULD DETERMINE WHETHER *WILLIAMSON COUNTY* RIPENESS REQUIREMENTS APPLY 26

CONCLUSION 28

TABLE OF AUTHORITIES

CASES

Agins v. City of Tiburon, 447 U.S. 255 (1980).....3

Albright v. Oliver, 510 U.S. 266 (1994).....15

Armendariz v. Penman,
75 F.3d 1311 (9th Cir. 1996).....passim

Bateman v. City of West Bountiful,
89 F.3d 704 (10th Cir. 1996).....9, 12

Bateson v. Geisse, 857 F.2d 1300 (9th Cir. 1988).....10

Bello v. Walker, 840 F.2d 1124 (3rd Cir. 1988).....16, 26

Carey v. Piphus, 434 U.S. 247 (1978).....8

Carr v. Town of Dewey, 730 F. Supp. 591 (D.Del. 1990) 26

Daniels v. Williams, 474 U.S. 327 (1986).....25

DeBlasio v. Zoning Board of Adjustment,
53 F.3d 592 (3rd Cir. 1995).....9, 15, 16

Dolan v. City of Tigard, 512 U.S. 374 (1994).....3, 7, 19, 20

Electro-Tech, Inc. v. H.F. Campbell Company,
433 Mich. 57, 445 N.W. 2d 61 (1989) 12

Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 10

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987).....7, 17, 23

Graham v. Connor, 490 U.S. 386 (1989).....passim

Hoeck v. City of Portland, 57 F.3d 781 (9th Cir. 1995)....9, 10

Lockary v. Kayfetz, 917 F.2d 1150 (9th Cir. 1990) 26

Macri v. King County, 110 F.3d 1496 (9th Cir. 1997).....1

Macri v. King County,
126 F.3d 1125 (9th Cir. 1997) .....passim

Miller v. Campbell County,
945 F.2d 348 (10th Cir. 1991).....12

Mindich Developers, Inc. v. Hunziker,
622 F.Supp. 1513 (S.D.N.Y. 1985).....3

Nollan v. California Coastal Commission,
483 U.S. 825 (1987) 3, 19, 20

Patel v. Penman, 103 F.3d 868 (9th Cir. 1996).....9, 11, 21

Pearson v. City of Grand Blanc,
756 F. Supp. 314 (E.D. Mich. 1991).....12, 13

Pearson v. Grand Blanc,
961 F.2d 1211 (6th Cir. 1992).....9, 13, 14, 27

Pruneyard Shopping Center v. Robbins,
447 U.S. 74 (1980) 17

Silverman v. Barry, 845 F.2d 1072 (D.C. Cir. 1988) 14

Sinaloa Lake Owners Association v.
City of Simi Valley, 882 F.2d 1398 (9th Cir. 1989).....10, 22

Sinclair Oil Corp. v. County of Santa Barbara,
96 F.3d 401 (9th Cir. 1996) 9, 11, 27, 28

Sintra v. City of Seattle,
131 Wash.2d 640, 935 P.2d 555 (1997) 12

Soldal v. Cook County, 506 U.S. 56 (1992) 24

Southern Co-op Development Fund v. Diggers,
696 F.2d 1347 (11th Cir. 1983) 26

State of Washington ex. rel.
Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928) 26

Tri County Industries, Inc. v. District of Columbia,
104 F.3d 455 (D.C. Cir. 1997) 9, 14, 15

United States v. James Daniel Good Real Property,
510 U.S. 43 (1993) 24, 25

United States v. Lanier,
__ U.S. __, 117 S.Ct. 1219 (1997) 25

Village of Arlington Heights v. Metropolitan Housing
Development Corporation, 429 U.S. 252 (1977). 26

Whitley v. Albers, 475 U.S. 312 (1986) 11, 21, 22

Williamson County Regional Planning Comm'n v. Hamilton
Bank, 473 U.S. 172 (1985) ..... passim

Zinermon v. Burch, 494 U.S. 113 (1990) 25

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V ..... passim

U.S. Const. amend. XIV ..... i, 13, 16, 19

U.S. Const. amend. XIV, §1 ..... 2, 15, 17

STATUTES

28 U.S.C. § 1254 2

42 U.S.C. § 1983 ..... 3, 7, 8, 23

Wash. Rev. Code § 58.17.180 3

OTHER AUTHORITIES

Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 Geo. L.J. 555 (1997) 18

Thomas E. Roberts, Takings, Due Process, and Preemption, 29 THE URBAN LAWYER No. 3, 399 (1997) 22

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals was initially issued on April 21, 1997, and is reported at *Macri v. King County*, 110 F.3d 1496 (9th Cir. 1997). That opinion was subsequently amended by order on September 17, 1997. Appendix (App.) E. The amended opinion is reported at 126 F.3d 1125, and is reproduced herein at App A.

JURISDICTION

The decision of the Ninth Circuit Court of Appeals was entered on April 21, 1997. Thereafter, petitioners sought reconsideration and rehearing *en banc*. On September 17, 1997, the opinion was amended and the petition for reconsideration and the suggestion for rehearing *en banc* were rejected. App. E. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "[N]or shall private property be taken for public use, without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

Section 1983 of Title 42 of the United States Code states in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

The subject matter of this action is the denial by King County of a plat application for an 11 lot residential subdivision. In a separate "writ of review" lawsuit,[1] Judge Nancy Ann Holman of the King County Superior Court previously ruled that the County's denial was arbitrary and capricious. App. D at 5. As the remedy in the writ action, Judge Holman directed the County to approve the application.

The present action was filed subsequent to the writ action and seeks damages resulting from the unlawful denial of the subdivision. Damages are sought under 42 U.S.C. § 1983 for violation of the Macris' substantive due process rights on the grounds that the denial was arbitrary and capricious. App. A at 4. The Macris also pled a Fifth Amendment takings claim alleging that the denial failed to substantially advance a legitimate government interest. App. A at 7. *See generally Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 383-85 (1994).[2]

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[1] Pursuant to Wash. Rev. Code 58.17.180, the denial of the plat application was reviewed by King County Superior Court to determine whether the denial was unlawful or arbitrary and capricious. *See* App. D at 2.

[2] The Macris also pled a takings under the Washington state constitution. That state law matter was settled by the parties after the District Court declined to exercise supplemental jurisdiction. App. A at 4 n.4. The Macris are pursuing their federal substantive due process claim to secure damages provided by Congress in 42 U.S.C. §§ 1983 including attorney's fees incurred in state court proceedings required to have the wrongfully withheld plat application issued. *See Mindich Developers, Inc. v. Hunziker*, 622 F. Supp. 1513, 1517 (S.D.N.Y. 1985). The Macris recognize that their total damages under Section 1983 will be offset by the amount received in the settlement of the state inverse condemnation claim.

Factual Background

The Macris' property is approximately 3.1 acres and is located in unincorporated King County, about five miles east of the City of Kent, Washington. App. D at 3. The proposed 11 residential lots were to be located on a cul-de-sac (referred to as El Cove) with access to the cul-de-sac provided by 200th Avenue S.E., a neighborhood collector street. *Id.*

The County initially denied the plat application on the basis of an unwritten rule not allowing more than 100 residential lots to be serviced by a single access road. Because prior development further down 200th Avenue S.E. had already taken place, the Macris' proposed 11 lots would place the access road beyond the 100-lot limit. Their application was therefore denied. App. D at 2.

In the prior writ action, Judge Holman made a number of findings. Despite the unwritten rule regarding street access, Judge Holman found street access to be adequate.

> 4. Street Access. The 200th Ave. S.E. corridor provides adequate access to El Cove. Said corridor is identified by County Road Standards as a neighborhood collector designed to service over 50 single family dwelling units. This corridor has ample capacity to provide vehicular access to El Cove.

App. D at 3. Judge Holman also found the application complied with all other legal requirements.

> 7. Plat Complies with all Legal Standards. El Cove Plat complies with all applicable legal standards lawfully imposed by King County and/or the State of Washington. This court does not construe the face of the findings adopted by the King County Council to the contrary and finds no requisite support in the record to justify a factual finding that the El Cove Plat does not comply with all objective legal standards.

App. D at 4.

As to the specific unwritten rule that the County applied to the Macris, Judge Holman explained:

> 8. Rule of Thumb does not have Force of Law. The so-called 100 lot limit rule of thumb does not have the force of law nor has it been consistently applied.

App. D at 4. Judge Holman further elaborated that the 100 lot limit

> was no more than an informal unwritten "rule of thumb" not supported by ordinance, resolution, formally adopted policy, or comprehensive plan provision.

App. D at 4. She concluded that that the

> rule of thumb was arbitrarily and irrationally applied to justify denial of the El Cove subdivision. The rule of thumb was arbitrary and irrational on its face and as applied. Application of the rule of

> thumb to this project was in disregard of the facts and circumstances of this proposal.

App. D at 4.

King County did not appeal the decision of Judge Holman. Instead, the King County Council finally approved the Macris' application approximately four years after the plat application was submitted. *See* App. D at 3 (application filed in 1990).

Subsequently, this damages action was commenced in King County Superior Court. The action was removed to federal court by the County. The Honorable Thomas S. Zilly dismissed all claims on June 5, 1995. App. B.

The Ninth Circuit's Decision

On appeal to the Ninth Circuit, the Macris contended that the state trial court rulings rendered by Judge Holman should have been given collateral estoppel effect in the federal court. They argued that applying collateral estoppel necessarily results in a conclusion that denial of the plat was a violation of their substantive due process rights and/or a taking of property without just compensation. The Ninth Circuit did not address the collateral estoppel issues. *See generally* App. A.

The Ninth Circuit instead ruled that the Macris' substantive due process claim was subsumed into their takings claim. Relying on Ninth Circuit precedent in *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) and this Court's decision in *Graham v. Connor*, 490 U.S. 386 (1989), the Ninth Circuit abolished substantive due process claims in the land use and zoning context. App. A at 6-8.

The Ninth Circuit's reasoning focused in part on this Court's decision in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), which reaffirmed that a taking occurs when a land use restriction does not "substantially advance legitimate state interests." *Id.* at 385.; *Macri*, App. A at 7. The Ninth Circuit recognized that if the Macris' could prove this allegation, the County's denial would constitute a taking. App. A at 7-8. However, in deciding that the Macris' substantive due process claim was subsumed into the Takings Clause, the Ninth Circuit did not discuss the impact of the divergent *legal standards* applied in takings claims as compared to substantive due process claims. *See Dolan*, 512 U.S. at 391 (distinguishing rational basis/arbitrary standard of due process and equal protection from the greater scrutiny applied in takings cases under the "substantially advance" test).

Similarly, the Ninth Circuit did not discuss or attempt to reconcile the constitutionally distinct *remedies* separating a takings claim from a substantive due process claim. *See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314 (1987) (invalidation is not the remedy for a taking; constitutionally mandated remedy is payment of just compensation); *Williamson County*, 473 U.S. at 194 (government taking of property is not unlawful; constitution merely requires payment of compensation).[3]

Nevertheless, the Ninth Circuit broadly held:

> Since the Takings Clause "provides an explicit source of constitutional protection"

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[3] While the **constitutional** remedy for a substantive due process violation is invalidation of the offending regulation as an unlawful exercise of the police power, Congress has determined that public policy supports providing constitutional violations with an additional **statutory** remedy for damages under 42 U.S.C. § 1983.

> against the challenged government conduct, substantive due process has no place in this context.

App. A at 8 (quoting *Armendariz*). In short, as long as there is a "just compensation" remedy for takings, the Ninth Circuit now holds that arbitrary and capricious government land use action can no longer be challenged (and thereby invalidated) on substantive due process grounds. The additional practical impact is to foreclose the remedy provided by 42 U.S.C. § 1983 for constitutional violations that would otherwise be available if the Macris can pursue and prevail on their substantive due process claim.

Having blocked the Macris' arbitrary and capricious substantive due process allegations, the Ninth Circuit next proceeded to dismiss the takings claim on ripeness grounds. The Ninth Circuit concluded that Washington has an adequate procedure for reimbursement for the taking of property and therefore concluded that dismissal on ripeness grounds was proper. App. A at 8.[4]

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[4] Similar to the federal constitution, the Washington state takings clause entitles one to a remedy of just compensation—fair market value of the property taken (or rental value for a temporary taking). However, the state remedy of just compensation is not the equivalent of the remedy of consequential damages and attorney fees provided by Congress under 42 U.S.C. sections 1983 and 1988 for a violation of substantive due process. *See Carey v. Piphus*, 434 U.S. 247, 262 (1978).

REASONS FOR GRANTING THE WRIT

I.

REVIEW SHOULD BE GRANTED TO RESOLVE A SIGNIFICANT AND DIRECT CONFLICT BETWEEN THE CIRCUIT COURTS

Two distinct and conflicting views have developed regarding the application of *Graham v. Connor* in the land use context. On one hand, there is the view of the Ninth and Tenth Circuits that holds, as described above, if the government action is subject to challenge as a taking without just compensation, there can never be a substantive due process claim. *Macri*; App. A at 4-8. *See also Armendariz*, 75 F.3d 1311; *Patel v. Penman*, 103 F.3d 868 (9th Cir. 1996); *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401 (9th Cir. 1996); *Bateman v. City of West Bountiful*, 89 F.3d 704, 709 (10th Cir. 1996).

A directly contrary rule applies in the Sixth, Third, and District of Columbia Circuits. *Pearson v. Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992); *DeBlasio v. Zoning Board of Adjustment*, 53 F.3d 592 (3rd Cir. 1995); *Tri County Industries, Inc. v. District of Columbia*, 104 F.3d 455 (D.C. Cir. 1997).

Prior to the *Armendariz* and *Macri* cases, the Ninth Circuit recognized the viability of substantive due process claims even after *Graham v. Connor* was decided. In *Hoeck v. City of Portland*, 57 F.3d 781, 784-85 (9th Cir. 1995), the panel noted the *Graham* issue, and stated that at

> first blush, the substantive due process claim would appear to be precluded by a more specific claim based on the Takings Clause. However, in *Sinaloa Lake Owners*

> *Association v. City of Simi Valley*, 882 F.2d 1398, 1408-09 n.10 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990), we held that *Graham* does **not** bar a companion substantive due process claim alleging that "the government has used its power in an abusive, irrational or malicious way." *Id.* at 1408-09 n. 10; *see also Bateson v. Geisse*, 857 F.2d 1300, 1303 (9th Cir. 1988) (finding that substantive due process claim is not subject to exhaustion requirement of taking claim).

Hoeck, 57 F.3d at 784-85 (emphasis added).

Subsequently, *Sinaloa Lake* was overruled by *Armendariz*. 75 F.3d at 1326. In so doing, the Ninth Circuit set forth its broad interpretation of *Graham*—that the Fourteenth Amendment is preempted by other provisions of the Constitution.

> We need not and do not address whether the City's conduct was rational. Even if the City's alleged conduct was "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare," *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395, (1926), the plaintiffs' substantive due process claim fails because it is preempted by other constitutional claims under the rule of *Graham v. Connor*.

Armendariz, 75 F.3d at 1318.

This Court was unfortunately not provided with an opportunity to review *Armendariz*.[5] Now, with the recent decision in *Macri*, and the similar decisions in *Patel* and *Sinclair Oil*, the Ninth Circuit approach is entrenched. As stated in *Sinclair Oil*:

> [I]n recent days we have expressly refuted the notion that substantive due process claims can apply where the government has allegedly effected a taking violative of the Fifth Amendment. *Armendariz v. Penman*, 75 F.3d 1322, 1325-26. In *Armendariz*, we explained that "[s]ubstantive due process analysis has no place in contexts already addressed by explicit textual provisions of constitutional protection, regardless of whether the plaintiff's potential claims under those amendments have merit." *Id.* Sinclair's substantive due process claim, therefore, no longer states a valid cause of action.

Sinclair Oil, 96 F.3d at 407.

The Tenth Circuit agrees with the Ninth Circuit and has jettisoned substantive due process protections of property entirely.

> Based on these authorities [*Graham* and *Whitley v. Albers*, 475 U.S. 312 (1986)], we conclude that Bateman's due process and equal protection claims are subsumed

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[5] The Westlaw case history in *Armendariz* does not include a reference to certiorari being denied, therefore, a petition apparently was not filed.

> within "the more particularized protections of the [Takings] Clause."

Bateman v. City of West Bountiful, 89 F.3d at 709 (quoting *Miller v. Campbell County*, 945 F.2d 348, 352 (10th Cir. 1991)).

The approach by the Ninth and Tenth Circuit's is summarized by Justice Talmadge on the Washington Supreme Court.

> [F]ederal jurisprudence has virtually rejected the application of substantive due process to land use claims under 42 U.S.C. § 1983, requiring instead that such claims be based on a specific constitutional provision such as the takings clause of the Fifth Amendment. *Armendariz*, 75 F.3d 1318.

Sintra v. City of Seattle, 131 Wash.2d 640, 683, 935 P.2d 555 (1997) (Talmadge, J., concurring) (writing to separately state that the Takings Clause is the only constitutional protection one has in regard to property).

A **directly conflicting view** is taken by the Sixth Circuit.[6] In *Pearson v. City of Grand Blanc*, 756 F. Supp. 314 (E.D. Mich. 1991), a denial of a rezone request was challenged on substantive due process, equal protection and

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[6] One judge on the Supreme Court of Michigan has also rendered a contrary view on the subject, adding further to the conflict among the nation's courts. "I do not believe that the principles recently applied by the Court in *Graham* require us to employ a Fifth Amendment taking analysis to the exclusion of substantive due process theories in cases involving the regulation of land use." *Electro-Tech, Inc. v. H.F. Campbell Company*, 433 Mich. 57, 127, 445 N.W. 2d 61, 93 (1989) (Brickley, J., dissenting)(citations omitted).

takings grounds. In considering the impact of *Graham*, the District Court acknowledged:

> Although the Supreme Court has on occasion held that the specific constitutional protection supercedes the more generalized due process protection, it has not ruled on whether the specific takings clause of the Fifth Amendment supercedes the general due process provisions of the Fifth and Fourteenth Amendments.

Pearson, 756 F. Supp. at 317.

The District Court proceeded to hold that the "takings clause supercedes any substantive due process claim in claims arising from local land use disputes." *Id.*

The District Court, however, was overruled by the Court of Appeals on this issue. The Sixth Circuit stated:

> [T]he district court opinion ... adopts the rationale that all federal zoning cases should be treated as "takings." After exhaustive research, we find that this proposition ... cannot be reconciled with current controlling precedent. Our research further reveals **the circuits to be deeply divided** concerning the theories to be employed in federal court cases challenging zoning.

Pearson v. Grand Blanc, 961 F.2d 1211, 1213-14 (6th Cir. 1992) (emphasis added).

The Sixth Circuit reviewed the law from the various circuits and was struck by the lack of uniformity on substantive due process claims like the Macris' which allege arbitrary and capricious land use actions.

> The lack of uniformity among the circuits in dealing with zoning cases of the "arbitrary and capricious substantive due process" category is remarkable.

Id. at 1217.

> We wish it were within our power to harmonize these decisions, but the conflicts among the circuits are too great. Harmony will have to await action by the Supreme Court.

Id. at 1220 n. 45. Accordingly, the Sixth Circuit has directly rejected the interpretation of *Graham* that is now adopted by the Ninth Circuit in *Armendariz* and *Macri*.

Like the Sixth Circuit, the District of Columbia Circuit rejects the approach taken by the Ninth and Tenth Circuits. In *Tri County Industries, Inc. v. District of Columbia*, 104 F.3d 455 (D.C. Cir. 1997), the court explained:

> Alternatively, Tri County appears to be invoking the more nebulous branch of substantive due process .... There is some authority under which the very closeness of this claim to the taking argument might be a ground for rejecting it. ... But in this circuit at least, under *Silverman* [*v. Barry*, 845 F.2d 1072, 1080 (D.C. Cir. 1988)], the requirements of the takings clause cannot be said to exhaust the Fifth Amendment's'

> substantive protection of property rights from government imposition.

104 F.3d at 459. The District of Columbia Circuit was persuaded in part by Justice Souter's concurrence in *Albright v. Oliver*, 510 U.S. 266, 286-87 (1994), which noted that this Court has rejected the proposition that

> "the Constitution's application to a general subject (like prosecution) is necessarily exhausted by protection under particular textual guarantees addressing specific events within that subject (like search and seizure)."

Tri County Industries, 104 F.3d at 459 (quoting *Albright*, 510 U.S. at 286-87 (Souter, J., concurring)).

The Third Circuit also continues to recognize the viability of substantive due process claims in the land use context. *DeBlasio*, 53 F.3d 592.

> This case raises important questions regarding the extent to which the due process clause of the Fourteenth Amendment may serve to protect landowners against arbitrary governmental regulation of land use. We conclude that in the context of land use regulation, a property owner states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrarily or irrationally reached.

Id. at 593. This conclusion of the Third Circuit is directly contrary to the Ninth Circuit's conclusion in the case at bar.

The importance of this issue was recognized by the Third Circuit in *DeBlasio*.

> We think it consistent with *Bello* [*v. Walker*, 840 F.2d 1124 (3rd Cir. 1988)] to conclude that ownership is a property interest worthy of substantive due process protection. Indeed, one would be hard-pressed to find a property interest more worthy of substantive due process protection than ownership. Thus, in the context of land use regulation, that is, in situations where the governmental decision in question impinges upon a landowner's use and enjoyment of property, a landowning plaintiff states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrarily or irrationally reached.

DeBlasio, 53 F.3d at 600-01.

Resolving this significant conflict among the circuits is necessary for orderly development of precedent, as well as to preserve constitutional rights. The divisions between the circuits are well defined and entrenched. Without guidance from this Court, the constitutional protections and remedies afforded a property owner will vary widely based on what region of the country a person lives. Certainly, whether one can rely on the substantive due process protection of the Fourteenth Amendment should not depend upon geography. This Court should grant this petition and harmonize the currently discordant circuits.

II

BY ASSUMING THAT DUE PROCESS AND TAKINGS CLAIMS ARE FUNGIBLE, THE NINTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION THAT CONFLICTS WITH THIS COURT'S JURISPRUDENCE

Two independent and very different constitutional protections are at issue in this case. The Takings Clause provides one explicit source of constitutional protection of property. It limits government power by requiring that, when government takes private property, just compensation be paid. *First English*, 482 U.S. at 315 (Takings Clause "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking"). If a taking occurs, the remedy is not invalidation of the action, but rather the constitutionally mandated remedy is payment of compensation. *Id.* As this Court made clear in *Williamson County*, "[t]he Fifth Amendment does not proscribe the taking of property, it proscribes taking without compensation." 473 U.S. at 194.

The substantive protection of the Due Process Clause is another explicit source of constitutional protection of property. However, this Court has consistently held that it protects citizens from a completely different kind of wrong—actions which are "unreasonable, arbitrary or capricious." *Pruneyard Shopping Center v. Robbins*, 447 U.S. 74, 84-85 (1980). It limits government power by requiring that exercise of the police power not be arbitrary and capricious but instead be rationally related to legitimate purposes. In contrast to the takings "just compensation" remedy, a regulation that is arbitrary and capricious is remedied by invalidating the offending exercise of the police power.

Professor Krotoszynski recognized the important distinctions between takings and substantive due process protections when he wrote:

> [S]ubstantive due process claims are not interchangeable with Takings Clause claims. ... The *Armendariz* court failed to appreciate the gravamen of a substantive due process action for the arbitrary deprivation of property. It is not the loss of property that justifies the claim, but rather the arbitrary and irrational nature of the government's action. ... The Takings Clause does not address itself to irrational government action; to the contrary, its text speaks to occasions of presumptively rational government behavior: the taking of private property for a public purpose.

Ronald J. Krotoszynshi, Jr., *Fundamental Property Rights*, 85 Geo. L.J. 555, 571-72 (1997).

These distinct purposes and remedies also employ significantly divergent legal standards to be applied to each provision. Significantly, this Court's precedents have explained that the rational basis/arbitrary and capricious test of due process is more deferential than the test utilized in takings claims under the "substantially advance legitimate state interests" standard.

> [O]ur opinions do not establish that these standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation "substantially advance" the

> "legitimate state interest" sought to be achieved, not that "the State '*could rationally have decided*' that the measure adopted might achieve the State's objective." Justice Brennan relies principally on an equal protection case and two substantive due process cases in support of the standards he would adopt. But there is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical.

Nollan, 483 U.S. at 834 n.3 (citations omitted; emphasis in original).[7] One of the bases for increased scrutiny in takings claims is that "in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective." *Nollan*, 483 U.S. at 841. Heightened scrutiny allows a court to determine whether a putative regulatory action masks a taking. *Dolan*, 512 U.S. at 385 ("the government may not require a person to give up a constitutional right—here the right to receive compensation when property is taken for a public use—in exchange for a discretionary benefit"); *see also id.* at 389 ("we think this

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[7] The increased scrutiny applicable under the Takings Clause was reaffirmed in *Dolan*.

> [T]he term "reasonable relationship" seems confusingly similar to the term "rational basis" which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment. We think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment. *Dolan*, 512 U.S. at 391.

standard [rational basis] is too lax to adequately protect petitioner's right to just compensation").

The greater deference afforded under the substantive due process test is also consistent with the drastic remedy applied in the due process context. The invalidation remedy stops government from engaging in the challenged action. When government desires to act in a certain manner, but is potentially stopped from doing so by a court, it is appropriate that the court afford government the greatest deference to accomplish its legitimate objectives. Only where government acts in an arbitrary and capricious manner will the action be struck down.

In contrast, the result of a successful taking claim is not invalidation of the government action. Rather, the government may continue to enforce the regulation or engage in the activity. The government simply pays compensation for the taking that results from its activity, but the activity or regulation may go on.

Despite these significant distinctions in the purposes, remedies, legal standards, and allocation of the burden of proof, [8] the Ninth Circuit nevertheless concludes that because a government action may be challenged as a taking, a substantive due process claim cannot be maintained. The Ninth Circuit position is inconsistent with this Court's precedent upholding these distinct purposes, protections and legal standards employed under the two constitutional provisions.

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[8] In a similar manner, the burden of proof is different in takings claims as compared to a substantive due process challenge. *Dolan*, 512 U.S. at 391 n.8 (citing *Nollan*, 483 U.S. at 836).

The issue was directly addressed recently in the Urban Lawyer in an article by Thomas Roberts, Professor of Law at Wake Forest University. Professor Roberts explains some of the inherent problems with the current Ninth Circuit precedent under *Armendariz*. Of course, with the more recent *Macri* decision, these problems have become more entrenched and in need of this Court's review.

> The difficulty with these Ninth Circuit decisions [*Armendariz* and *Patel*] is that they do not make it clear that only some substantive due process claims are duplicates of taking claims, and only those should be subsumed. Substantive due process claims fall into two categories: (1) that the action taken by the state serves no legitimate public purpose, or has been accomplished in an irrational manner, or (2) that despite the existence of a legitimate end and a rational means, the effect is unduly onerous on the affected property owner. The former claim does not depend in any fashion on the economic impact. It does not duplicate what the Fifth Amendment does, and it ought not be preempted under the *Whitley-Graham* rule. Failure to separate the two types of substantive due process claims may result in some due process claims being preempted that ought not be. If the state prohibits redheaded persons from living in certain zones, the action may be arbitrary, but it does not constitute a taking. Likewise, if a state prohibits persons who are related by blood, marriage, or adoption from sharing living quarters, the action may violate substantive due process. The

> complainants deserve injunctive relief, and possibly damages, but they should not be relegated to a taking claim, where the only relief is compensation."

Thomas E. Roberts, Takings, Due Process, and Preemption, 29 THE URBAN LAWYER No. 3, 399, 407-08 (1997).

Prof. Roberts further correctly explained that the Ninth Circuit's venture into these waters, which includes overruling its own prior decision in *Sinaloa Lakes Owners Association*, is headed in the wrong course.

> In *Armendariz*, the Ninth Circuit said that on the basis of *Whitley* and *Graham*, the *Sinaloa* substantive due process claim should be dismissed. But should it? If the state drained a lake to create an area of wetlands elsewhere that was necessitated by the construction of a public project, it is likely a taking would be found. ... But, if the state drained the lake for no legitimate reason, as claimed in *Sinaloa*, the action could not be a taking for which compensation would be due, since the action would lack a valid public purpose. Rightful exercise of the police power that goes too far is a regulatory taking, but a wrongful exercise of the police power is a violation of substantive due process.

Roberts at 408-09.

In summary, the proper analysis should look first to whether there is a substantive due process violation under the arbitrary and capricious standard. If that claim is proven, the offending regulation must be invalidated and the claimant

may recover damages pursuant to 42 U.S.C. § 1983. If the substantive due process claim is not successful, a court should then proceed to the takings claim. If a taking is found under any of the various tests for a taking, including a taking based on failure of the government regulation to substantially advance a legitimate state interest, compensation must follow. A court may not invalidate or repeal the taking. That choice must be left for the government agency. *First English*, 472 U.S. at 317 (government may choose to repeal its action and convert the taking into a temporary one).

Significantly, the Ninth Circuit in the case at bar failed to recognize that the Macris' substantive due process claim is based on allegations of an arbitrary and capricious government action. If successful, the Macris' remedy is invalidation of the government action and whatever damages are due under 42 U.S.C. § 1983. While the Macris have already secured invalidation of the government action through their successful state court writ action, they are nevertheless entitled to pursue their additional statutory remedies provided by Congress for constitutional violations.

The Ninth Circuit, however, wrongfully concluded that the Fourteenth Amendment no longer protects individuals' interests in their property.

III

THIS COURT SHOULD DETERMINE WHETHER *GRAHAM* CAUSES THE TAKINGS CLAUSE TO REPLACE SUBSTANTIVE DUE PROCESS PROTECTION FROM ARBITRARY AND CAPRICIOUS GOVERNMENT ACTION

In *Graham* this Court held:

> all claims that law enforcement officers have used excessive force ... [in a "seizure"] should be analyzed under the Fourth Amendment and its "reasonableness" standard, rather than under a "substantive due process" approach. Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.

Graham, 490 U.S. at 395.

This Court has already recognized the limited impact of *Graham* in *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993):

> We have rejected the view that the applicability of one constitutional amendment preempts the guarantees of another. As explained in *Soldal v. Cook County*, 506 U.S. [56] (1992): "Certain wrongs affect more than a single right and,

> accordingly, can implicate more than one of the Constitution's commands. Where such multiple violations are alleged, we are not in the habit of identifying as a preliminary matter the claim's 'dominant' character. Rather, we examine each constitutional provision in turn."

James Daniel Good, 510 U.S. at 49-50.

More recently, in *United States v. Lanier*, __ U.S. __, 117 S.Ct. 1219, 1228 n.7 (1997), this Court explained that *Graham* does not hold that all constitutional claims relating to physically abusive government conduct must arise under either the Fourth or Eighth Amendments. Rather, *Graham* simply requires that if a constitutional claim is covered by a specific constitutional provision, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.

This Court should now address whether the Takings Clause is an explicit source of constitutional protection that operates to exclude substantive due process claims in the land use context. The Ninth and Tenth Circuits so hold. The Sixth, Third, and District of Columbia Circuits do not. A decision from this Court is necessary to reconcile not only the conflicts among the circuit courts, but also to determine the continuing precedential value of this Court's substantive due process precedent in the land use context. This Court has often reaffirmed the right to substantive due process, stating that "the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). More specifically, the right to substantive due process in land use cases has previously been well recognized. *Village of*

Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252, 263 (1977); *State of Washington ex. rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 122 (1928) (giving private parties control over government permit). Only this Court can provide the guidance now required to reconcile the conflicts of law and to clarify the relation between the Takings Clause claims and substantive due process.

There are many instances in the land use context where substantive due process, not takings, should be the appropriate constitutional challenge. Such cases include those where a permit is denied for partisan political or personal reasons unrelated to the permit (*Bello*, 840 F.2d 1124), or if there is a refusal to follow the law for no reason (*Southern Co-op Development Fund v. Diggers*, 696 F.2d 1347 (11th Cir. 1983)), or faking a water shortage to keep outsiders out (*Lockary v. Kayfetz*, 917 F.2d 1150 (9th Cir. 1990)), or revoking a permit in retaliation for successfully seeking judicial review (*Carr v. Town of Dewey*, 730 F. Supp. 591 (D.Del. 1990)). If eliminated, these and other instances of arbitrary regulatory action will be allowed to continue, subject only to the payment of just compensation. If that is to be the law, it should come from this Court.

IV.

IF SUBSTANTIVE DUE PROCESS NO LONGER APPLIES TO PROPERTY, THIS COURT SHOULD DETERMINE WHETHER *WILLIAMSON COUNTY* RIPENESS REQUIREMENTS APPLY

After dismissing the Macris' substantive due process claim, the Ninth Circuit next determined that the Macris' takings claim was not ripe. App. A at 8 (citing *Williamson County*).

One of the practical impacts resulting from the Ninth Circuit's ruling is that in all land use cases, the stringent ripeness requirements for takings claims would be imposed. As recognized by the Sixth Circuit in *Pearson*:

> By holding that the taking theory subsumes all other theories in zoning cases, the trial court in the instant case would impose these stringent ripeness requirements on all zoning cases.

Pearson, 961 F.2d at 1215. The problem with imposing these ripeness requirements is that the *Williamson County* state compensation remedy requirement makes no sense in the context of an arbitrary and capricious claim where the remedy should be invalidation of the offending regulation. Indeed, the Ninth Circuit is internally in conflict on this issue. In *Sinclair Oil*, directly conflicting with the decision in *Macri*, the panel held:

> [W]hile the just compensation ripeness requirement does not apply to "legitimate state interest" facial taking claims, it does apply to claims premised upon the denial of a property's economically viable use. Therefore, the federal facial taking claim contained in count three of Sinclair's complaint is not ripe, because it contends that the Plan stripped More Mesa of its economically viable use. On the other hand, the federal facial taking claim embodied in count four of Sinclair's complaint is ripe, as it asserts that the Plan

> does not substantially advance a legitimate state interest.

Sinclair Oil, 96 F.3d at 407. If the Ninth Circuit's view of *Graham* is to be upheld, this Court should then resolve the conflict regarding the correct application of the *Williamson County* ripeness requirements to a claim based on failure to substantially advance a legitimate state interest.

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CONCLUSION

As the Sixth Circuit stated in 1992, there is a need for this Court to harmonize the conflict among the circuits. The discord has not resolved itself, but rather become more intense and more confusing.

While nuances of constitutional law may vary among the circuits, the present state of the law is a resounding clash. Only this Court can ensure that the right to be free from arbitrary and capricious government action is not replaced with the right to be paid only the just compensation remedy for enduring the unconstitutional action.

DATED: December 16, 1997

Respectfully submitted,
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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOE A. MACRI; LOUISE MACRI; JOE F. MACRI; AND ELEANOR MACRI,

Plaintiffs-Appellants

v.

KING COUNTY, a political subdivision of the State of Washington,

Defendant-Appellee.

No. 95-35709
D.C. No.
CV 94-305-TSZ

OPINION

United States Court of Appeals,
Ninth Circuit.
Argued and Submitted August 9, 1996.

Decided April 21, 1997.
As Amended on Denial of Rehearing and Rehearing
En Banc September 17, 1997.

Appeal from the United States District Court for the Western District of Washington, Thomas S. Zilly, District Judge, Presiding. D.C. CV 94-305-TSZ.

Before: BEEZER and O'SCANNLAIN, Circuit Judges, and BROWNING, District Judge. [1]

[1] The Honorable William D. Browning, United States District Judge for the District of Arizona, sitting by designation.

WILLIAM D. BROWNING, District Judge:

I

Appellants' preliminary plat application was denied by Appellee ("the County"). A Washington state superior court ruled that the denial was wrongful and a preliminary application was granted. Appellants then filed this action in state court, alleging civil rights violations under 42 U.S.C. § 1983, a federal takings violation, and various state law violations. The County removed the action to federal court. The district court dismissed all federal claims and two of the state claims, and remanded the state inverse condemnation claim to state court. Appellants appeal the judgment dismissing the claims. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

II

In March 1990, Appellants filed an application with King County to subdivide their 3.1 acre property located on a dead end road in King County into 11 lots. After two hearings, the Hearing Examiner recommended that the application be denied because of inadequate access. The Hearing Examiner considered basing the decision on an informal "rule of thumb" often followed by the County that generally limited the number of lots which could be developed in an area with only one access road (the "100-lot" limit). However, the Hearing Examiner explicitly rejected the rule of thumb as a basis for his ruling because of its informal nature and instead relied upon a county ordinance allowing denial of an application if provision is not made for "the public health, safety, and welfare." Wash. Rev.Code § 58.17.110. The County Council adopted the Hearing Examiner's recommendation and denied the application on January 27, 1992. Appellants brought a writ of certiorari in

King County Superior Court to review the denial. On January 7, 1994, the superior court judge found the County's action "arbitrary and capricious," among other things, and ordered the County to approve the application. The superior court based its decision in part on its belief that the Hearing Examiner's decision was based on the informal rule of thumb and that the rule of thumb was arbitrary on its face and as applied. Also, the superior court found a lack of nexus between Appellants' proposed subdivision and the "alleged [access] problem." Finally, despite the fact that the complaint sought only review of the County Council's action, the superior court also heard arguments on constitutional issues. The court concluded that Appellants' substantive due process rights had been violated, and that the County's action had resulted in a taking without compensation in violation of the Fifth Amendment. Pursuant to the superior court's order, the County granted preliminary approval for the plat on February 28, 1994.[2]

Appellants brought this action against King County in the King County superior court on February 4, 1994. They claimed statutory damages for arbitrary agency action under Wah. Rev.Code Ch. 64.40, damages for inverse condemnation under the Washington Constitution, and civil rights violations under 42 U.S.C. § 1983, including violations of their substantive due process rights and a taking of property without just compensation contrary to the Fifth and Fourteenth Amendments.[3] King County removed to the federal district court. The district court dismissed all of the

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[2] As of February 21, 1995, a year after they achieved preliminary approval, Appellants had done nothing further to obtain final approval of their plat application.

[3] Appellants also brought a state claim for interference with economic expectancy, but the district court dismissed that claim with prejudice on the grounds of quasi-judicial immunity. Appellants do not appeal this ruling.

federal claims through a series of summary judgments; the district court dismissed the takings claim on the ground that it was not ripe and dismissed the substantive due process claims on the ground that Appellants did not, as a matter of law, demonstrate a violation of their due process rights. The district court also dismissed the state statutory damages claim on limitations grounds, and, declining to exercise supplemental jurisdiction, remanded the remaining state inverse condemnation claim to state court.[4] This appeal followed.

III.

[1] We review the district court's grant of summary judgment de novo. *Sederquist v. City of Tiburon*, 765 F.2d 756, 759 (9th Cir. 1984). The dismissal of the federal takings claim due to ripeness and the dismissal of the state claim based on statute of limitations are reviewed de novo. *Dodd v. Hood River County*, 59 F.3d 852, 857 (9th Cir. 1995); *Washington v. Garrett*, 10 F.3d 1421, 1428 (9th Cir. 1993).

IV.

Appellants' claims invoked the substantive protections of the Fourteenth Amendment's Due Process Clause ("nor shall any State deprive any person of life, liberty, or property, without due process of law") and the protections of the Fifth Amendment's Takings Clause ("nor shall private property be taken for public use, without just compensation"). At the time Appellants filed this action, we had recognized the existence of both claims on similar facts. *See Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398 (9th Cir. 1989) (as amended), overruled by *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996).

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[4] The state inverse condemnation claim was subsequently settled by the parties in state court.

Subsequent to the district court's decision, however, this Court, in an en banc opinion, held that when an explicit textual provision of the Constitution protects against the challenged government action, the claim must be analyzed under that specific provision alone and not under the more general guarantee of substantive due process. *Armendariz*, 75 F.3d at 1325-26. Relying on the Supreme Court's decision in *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), which held that all claims of excessive force must be brought under the Fourth Amendment's excessive force clause and not under the more general substantive due process analysis, we held that "[s]ubstantive due process analysis has no place in contexts already addressed by explicit textual provisions of constitutional protection, regardless of whether the plaintiff's potential claims under those amendments have merit." *Armendariz*, 75 F.3d at 1325-26.[5]

In *Armendariz*, the plaintiffs alleged that the City performed inspections and over enforced the housing code, eventually causing plaintiffs to lose their property through foreclosure, so that the land could be developed for private gain. We held that "[b]ecause the ... Fifth Amendment[ ] provide[s] explicit limitations on the type of conduct challenged by plaintiffs, Graham dictates that [the Fifth Amendment], not the Fourteenth Amendment's guarantee of substantive due process, should guide the analysis of the plaintiff's claim." *Id.* at 1320. Although the plaintiffs did not bring a takings claim, we held that this aspect of their claim was that of a private taking, i.e., the taking of private property for private use. *Id.* at 1321. The greater part of the opinion is spent in analyzing whether the Fifth Amendment's Takings Clause provides a remedy for private takings. We

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[5] Our decision in *Armendariz* has been affirmed by a three judge panel on facts virtually indistinct from the facts presented in *Armendariz*. *Patel v. Penman*, 103 F.3d 868 (9th Cir. 1996).

determined that "the Takings Clause 'provides an explicit textual source of constitutional protection' against 'private takings,'" *id.* at 1324 (quoting *Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865, 1871, 104 L.Ed.2d 443 (1989)), and thus that plaintiffs' substantive due process claim would not stand. *Id.*

The basis for our decision in *Armendariz* was the belief that the substantive due process clause must be expanded only with the greatest care and that its protection is primarily reserved for "liberties 'deeply rooted in this Nation's history and tradition.'" *Id.* at 1319 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503, 97 S.Ct. 1932, 1937, 52 L.Ed.2d 531 (1977)). We noted the Supreme Court's move away from extending substantive due process protection to purely economic interests, *see Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905), when the Supreme Court, in "invalidating economic legislation, engaged in a level of judicial activism which was unprecedented in its time and unmatched since." *Armendariz*, 75 F.3d at 1318. Thus, we announced an "exception to the general rule [that a plaintiff can seek relief under multiple constitutional theories], recognized out of a well-placed reluctance to expand the concept of substantive due process. ... The scope of substantive due process does not extend to areas addressed by other, more specific provisions of the Constitution." *Id.* at 1326.

[2][3] A second concern we addressed in *Armendariz*, which was also a concern for Appellants in this case, was a loophole in takings law regarding the ripeness doctrine. Namely, by presenting essentially a takings claim under the claim of substantive due process, plaintiffs were able to avoid the ripeness requirements of *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L. Ed. 2d 126 (1985). It is axiomatic that a takings violation is not complete until the plaintiff has

sought compensation through state remedies and been denied, whereas a substantive due process violation is complete as soon as the government action occurs.

[4] Appellants' complaint alleges that King County violated their right to due process and took their property without just compensation contrary to the Fourteenth and Fifth Amendments. Specifically, their complaint alleges and their brief argues that King County effected a taking by denying their plat application without substantially advancing a legitimate public purpose and under circumstances denying them any beneficial use of the property. At oral argument, appellants attempted to distinguish *Armendariz* by classifying their claim solely as a due process violation and not as a takings violation at all. They argued that when government action fails substantially to advance a legitimate government purpose, the claim should lie under the Due Process Clause regardless of whether the action involves real property rights. Appellants, however, cannot sidestep *Armendariz* by re-characterizing their claim as lying solely in substantive due process.

The Supreme Court has repeatedly recognized that a land use restriction that does not "substantially advance legitimate state interests" or "denies an owner economically viable use of his land" effects a taking. *Agins v. City of Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980); *Nollan v. California Coastal Comm'n* 483 U.S. 825, 834, 107 S.Ct. 3141, 3147, 97 L.Ed.2d 677 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 383-85, 114 S.Ct. 2309, 2316, 129 L.Ed.2d 304 (1994). In *Dolan*, the Supreme Court reaffirmed that the Fifth Amendment's Takings Clause applies to the states through the Fourteenth Amendment, rejecting the suggestion that the case was actually grounded in substantive due process. If Appellants can prove that King County denied their plat application without advancing a legitimate state interest or under

circumstances denying them any economically viable use of their property, King County's actions would constitute a taking.

Since the Takings Clause "provides an explicit source of constitutional protection" against the challenged governmental conduct, substantive due process has no place in this context. *Armendariz*, 75 F.3d at 1325; *see Patel v. Penman*, 103 F.3d 868 (9th Cir. 1996).

V.

The district court dismissed Appellants' federal takings claim as unripe. Appellants argue that the dismissal on ripeness grounds was improper and that the district court should have remanded the federal takings claim to the state court along with the state inverse condemnation claim.

[5][6] The Fifth Amendment is not offended by the government taking property, but only by the government taking property without just compensation. Thus, a Fifth Amendment takings claim is not ripe until the plaintiff has been denied compensation by the state. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 97 L.Ed.2d 126 (1985). If a state has an adequate procedure for compensation, until this procedure has been exhausted and the plaintiff denied compensation, no taking has occurred. *Sinaloa Lake Owners Ass'n*, 882 F.2d at 1402. Washington has an adequate procedure for reimbursement for the taking of property. *Guimont v. Clarke*, 121 Wash.2d 586, 594, 854 P.2d 1, 5-6 (1993). Therefore, dismissal of Appellants' claim on ripeness grounds was proper. *Bateson v. Geisse*, 857 F.2d 1300, 1306 (9th Cir. 1988).

The district court also properly remanded the remaining state inverse condemnation claim to state court.

Under 28 U.S.C. § 1367(c)(3), a district court may decline to exercise supplemental jurisdiction if it has dismissed all claims over which it had original jurisdiction. The district court had dismissed all federal and constitutional claims, and did not abuse its discretion in remanding the state claim to state court.

[7] Appellants argue that their federal takings claim should have been remanded along with the state inverse condemnation claim because, unless the federal claim is considered in state court, Appellants will be precluded from bringing the federal claim on the basis of res judicata. In support of this argument, Appellants cite cases in which the federal court applied principles of res judicata to dismiss a federal claim after the state court had given full and fair consideration to both the federal and the state claims. *Palomar Mobilehome Park Ass'n v. City of San Marcos*, 989 F.2d 362, 364-65 (9th Cir. 1993); *Peduto v. City of North Wildwood*, 878 F.2d 725, 726-28 (3rd Cir. 1989).[6] However, we have expressly held that the failure of a plaintiff to raise a federal takings claim in state court does not preclude that plaintiff from bringing a subsequent federal takings claim in federal court. *Dodd v. Hood River County*, 59 F.3d 852, 859-60 (9th Cir. 1995).[7] Therefore, the district court properly dismissed the federal takings claim.

VI

Finally, Appellants contend that the district court erred in dismissing their claims under Wash. Rev.Code §

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[6] Appellants also cite *Mission Oaks Mobile Home Park v. City of Hollister*, 989 F.2d 359 (9th Cir. 1993). *Mission Oaks*, however, dealt only with *Younger* abstention and is inapposite for our purposes.

[7] *Dodd* also clearly holds that a court can reserve a federal issue so that the issue will not be precluded from further litigation, despite Appellants' assertion that their federal claim will necessarily be precluded by res judicata. *Dodd*, 59 F.3d at 862.

64.40.020 as untimely.

Wash.Rev.Code § 64.40.030 provides:

> Any action to assert claims under the provisions of this chapter shall be commenced only within thirty days after all administrative remedies have been exhausted.

[8][9] The County Council adopted Ordinance 10252 denying Appellants' plat application on January 27, 1992. Appellants did not file their claim for damages under Wash. Rev.Code Ch. 64.40 until February 4, 1994, more than two years after the final determination by the County Council. However, while the Council's action would have been the final administrative remedy if Appellants had done nothing, Appellants brought an action in King County Superior Court on February 26, 1992, specifically for the purpose of overturning what Appellants claimed was arbitrary and capricious action by the Council. The superior court ruled in Appellants' favor on January 7, 1994, and ordered the County to approve the application. Appellants are correct that, under these facts, their administrative remedies were not exhausted until February 28, 1994, when, pursuant to the superior court's order on Appellant's writ of certiorari, the County Council finally approved the preliminary plat application. *See Hayes v. City of Seattle*, 934 P.2d 1179, 1183-84 (1997). However, Appellants filed their claim for damages under Wash.Rev.Code Ch. 64.40 on February 4, 1994, more than three weeks before the County Council finally approved the preliminary plat application. Appellants claim was therefore unripe under the plain language of § 64.40.030, which explicitly states that actions must be "commenced only within thirty days after all administrative remedies have been exhausted." Wash.Rev.Code § 64.40.030 (emphasis added). This conclusion is supported

by the decision of the Washington Supreme Court in *Hayes*, which noted that "final action on [applicant's] request for a permit did not occur until the City Council ultimately approved his application [following judicial review of the Council's initial determination]. ..." *Hayes*, 934 P.2d at 1184. Consequently, Appellants' claim under Ch. 64.40 was properly dismissed by the district court as untimely, not for the reason that it exceeded the limitations period, however, but because it was unripe.

VII

We accordingly affirm the district court's dismissal of Appellants' substantive due process claim based on *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996), which held that a more general substantive due process claim cannot be brought if the claim is based on governmental conduct which implicates an enumerated constitutional right.

Further, we affirm the district court's grant of King County's cross motion for summary judgment on the federal takings claim on ripeness grounds. Likewise, we affirm the district court's grant of King County's motion to dismiss on the state statutory damages claim for the reason that Appellants' claim was untimely.

AFFIRMED.

APPENDIX B

UNITED STATES |DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOE A. MACRI; LOUISE MACRI; JOE F. MACRI; AND ELEANOR MACRI,

No. C94-305Z

Plaintiffs-Appellants

ORDER
(Filed
June 5, 1995)

KING COUNTY, a political subdivision of the State of Washington,

Defendant-Appellee.

_____/

THIS MATTER comes before the Court on Plaintiffs' motions for summary judgment, docket nos. 47 & 48, and Defendant's cross- motions for summary judgment, docket nos. 58 & 60. On May 25, 1995, the Court heard oral argument from the parties with regard to these motions. At that time, the Court issued the following oral rulings:

(1) the Court denied Plaintiffs' motion to amend their complaint to include a federal equal protection claim;

(2) the Court held that collateral estoppel does not apply and that Plaintiffs' attorneys fees request pursuant to RCW 8.25.075 is premature; and

(3) the Court requested additional briefing on the issue of quasi-judicial immunity with respect to Plaintiffs' claim of intentional interference with business expectancy.

See Minutes (docket no. 94). The due date for further briefing has passed, and the Court has received no response from Plaintiffs regarding Defendant's argument that it has immunity from actions that sound in ordinary tort. See Lutheran Day Care v. Snohomish County, 119 Wn. 2d 91, 125-27, 829 P.2d 746 (1992), cert. denied, 113 S. Ct. 1044, 122 L. Ed. 2d 353 (1993). The Court treats Plaintiffs' failure to respond as an admission that opposition would be without merit. Local Rule CR 7(b)(4).

Having considered the oral arguments of the parties, and having reviewed all papers filed in support, and in opposition to, each motion for summary judgment, the Court hereby ORDERS:

(1) Plaintiffs' motion for summary judgment on due process, docket no. 47, is DENIED;

(2) Defendant's cross-motion for summary judgment on due process, docket no. 60, is GRANTED;

(a) Plaintiffs' due process claim, brought under 42 U.S.C. § 1983, is DISMISSED;

(b) Plaintiffs' claim for intentional interference with business expectancy is DISMISSED with prejudice on grounds of quasi-judicial immunity;

(3) Plaintiffs' motion for summary judgment on inverse condemnation or taking, docket no. 48, is DENIED;

(4) Defendant's cross-motion for summary judgment on takings and inverse condemnation, docket no. 58, is GRANTED in part, and DENIED in part;

(a) Plaintiffs' federal takings claim, also brought under 42 U.S.C. § 1983, is DISMISSED as not ripe for review;

(b) The Court declines to exercise supplemental jurisdiction over Plaintiffs' state inverse condemnation claim;

(5) This case is REMANDED to state court for further proceedings.

BACKGROUND

The material facts in this case are not in dispute. Plaintiffs own 3.1 acres of property located about five miles east of the city of Kent in King County. Exhibit 3, at 1, 4, Affidavit of H. Kevin Wright (docket no. 56) [hereinafter "Wright Affidavit"]. On March 27, 1990, Plaintiffs submitted to the County an application for a preliminary plat approval. The application complied with all zoning and lawfully adopted ordinances. Plaintiffs proposed to subdivide their property into 11 lots to be known collectively as the "El Cove" plat. Access to the proposed plat was to be provided from S.E. 272nd Street (the Kent-Kangley Road) along the 200th Avenue S.E. corridor. The 200th Avenue S.E. corridor was classified by the County as a "neighborhood collector" road, which by County ordinance may serve over

50 single family dwelling lots. Transcript, at 86, Exhibit 11 to Declaration of Joseph Macri (docket no. 49) [hereinafter "Macri Declaration"]. The King County road standards existing during the period at issue did not limit the maximum number of lots which could be served by a neighborhood collector. King County, however, had an unwritten and long standing policy of limiting to 100 the number of lots that could be developed using a single access.

In May 1991, after reviewing the King County Building and Land Development Division's report, the King County Zoning and Subdivision Examiner recommended to the King County Council that Plaintiffs' proposed plat be denied based on an unwritten policy of "not allowing more than 100 lots to be served from a single access street." Exhibit 5, at 1, Macri Declaration; see Exhibit 6 (Examiner's Report and Recommendation), Macri Declaration. Although the Examiner concluded that Plaintiffs' 11 additional lots "would not be significant," Finding No. 10, Exhibit 6 to Macri Declaration, the Examiner recommended denying Plaintiffs' plat "[u]ntil such time as an additional neighborhood collector street is available," Conclusion No. 1, Exhibit 6 to Macri Declaration.

Plaintiffs timely appealed to the King County Council. The Council expressed concerns about relying upon an unwritten policy to deny a plat and remanded the proposed El Cove plat to the Zoning and Subdivision Examiner for further consideration. The Examiner's second hearing concerned the appropriateness of the "100-lot limit." The Examiner found that the "100-lot limit" was the County's "practice," but that it had not been adopted by ordinance. Finding Nos. 2 & 8, Exhibit 4 to Macri Declaration. The Examiner concluded, "[i]n view of the absence of an adopted regulation ..., King County cannot apply [the 100-lot limit], or any other, specific limit automatically, either as a matter of subdivision regulation or environmental protection." Finding

No. 8, Exhibit 4 to Macri Declaration. The Examiner further concluded:

> The proposed plat of El Cove should not receive preliminary approval unless and until appropriate provision is made for adequate traffic circulation by the establishment and construction of a second access to the County arterial road system.

Conclusion No. 3, Exhibit 4 to Macri Declaration. The Examiner recommended, if Plaintiffs would agree to a deferral, a remand of the application to the Building and Land Development Division for further consideration "at such time as an adequate traffic circulation pattern is established, which will provide a second access route to the arterial road system." Exhibit 4, at 7, Macri Declaration. If Plaintiffs would not agree to a deferral, the Examiner recommended denial of the application. Id.

Plaintiffs appealed again to the King County Council. Plaintiffs would not consent to deferral and the Council denied the proposed plat of El Cove. Plaintiffs timely appealed to Superior Court through a Writ of Review. By Order on Review dated January 7, 1994, Judge Nancy Ann Holman ordered King County to approve Plaintiffs' preliminary plat application. Exhibit 2, at 6, Macri Declaration. Thereafter, King County enacted Ordinance 10435 § 1, imposing a "100-lot limit" on future plat applications. The validity of that ordinance is not at issue here. On February 28, 1994, the King County Council granted Plaintiffs' preliminary approval for the El Cove plat. Exhibit 11, Wright Affidavit. Since receiving preliminary approval, Plaintiffs have taken no steps to obtain final approval of the subdivision. Deposition of Joseph Macri, at 44, 48-49, Exhibit 1 to Declaration of Cassandra Newell (docket no. 59).

Plaintiffs commenced this action for damages in state court, claiming intentional interference with business expectancy, and suing under RCW 64.40.020 for arbitrary agency action,[1] and under 42 U.S.C. § 1983[2] for violation of their civil rights under the due process and just compensation clauses of the Fifth Amendment, as applied to the states under the Fourteenth Amendment. Plaintiffs also sue under Article I, § 16 of the Washington Constitution for inverse condemnation.[3] Plaintiffs seek damages for the County's delay in approving the El Cove plat during the period from March 27, 1990 to February 28, 1994. Defendant removed the action to this Court pursuant to 28 U.S.C. § 1441 (a) - (c). Plaintiffs have now moved for summary judgment on all claims.

ANALYSIS

---

[1] By Minute Order dated July 29, 1994, the Court dismissed Plaintiffs' claim under RCW 64.40.020 for failure to comply with the applicable statute of limitations. Minute Order (docket no. 26).

[2] 42 U.S.C. § 1983 provides, in part:

> Every person who, under color of any statute ... subjects ... any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[3] Plaintiffs contend that Article I, § 16 of the Washington Constitution affords greater protection than the just compensation provisions of the United States Constitution. As Defendant correctly indicates, Plaintiffs have not briefed the Gunwall factors necessary for the Court to perform an independent state constitutional analysis. See State v. Gunwall, 106 Wn. 2d 54, 720 P.2d 808 (1986); see also Guimont v. City of Seattle, 77 Wn. App. 74, 79 n.4, _____ P.2d _____ (1995). As the Court does not reach the merits of Plaintiffs' state law takings claim, the Court has not sought further briefing on the Gunwall analysis.

A. The Summary Judgment Standard

Summary judgment is proper only if "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of establishing an absence of genuine factual issues. High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 574, reh'g denied, 909 F.2d 375 (9th Cir. 1990). The Court should assume the truth of evidence proffered by the party opposing summary judgment and draw all reasonable inferences in the light most favorable to the nonmovant. Lindahl v. Air France, 930 F.2d 1434, 1437 (9th Cir. 1991).

B. Substantive Due Process

"[T]he due process clause includes a substantive component which guards against arbitrary and capricious government action, even when the decision to take that action is made through procedures that are in themselves constitutionally adequate." Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398, 1407 (9th Cir. 1989), cert. denied, 494 U.S. 1016 (1990). Plaintiffs here do not challenge the adequacy of the County's procedures in denying their preliminary plat application; rather, Plaintiffs allege a violation of their substantive due process rights. The protection from government action provided by substantive due process has traditionally been reserved for the vindication of fundamental rights involving matters of marriage, family, procreation and the right to bodily integrity. Albright v. Oliver, _____ U.S. _____, 114 S. Ct. 807, 812, 127 L. Ed. 2d 114, 122 (1994). When a plaintiff relies on substantive due process to challenge governmental action that does not involve a fundamental right, the courts "do not require that the government's action actually advance its stated purposes, but merely look to see whether the

government could have had a legitimate reason for acting as it did." Halverson v. Skagit County, 42 F.3d 1257, 1262 (9th Cir. 1994). Unlike in a takings case, in which the Court must balance the public interest against the severity of the private deprivation, in a substantive due process case, the Court need only evaluate the rationality of the government action, without regard to its impact. Id.; see also Sinaloa Lake, 882 F.2d at 1407 ("To establish a violation of substantive due process, the plaintiffs must prove that the government's action was 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." (quoting Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926))).

Here, the County had a legitimate reason for denying Plaintiffs' preliminary plat application. Washington law provides that a subdivision may not be approved unless it makes appropriate provisions for "the public health, safety, and general welfare." RCW 58.17.110. The King County Code requires that a proposed subdivision "and its ultimate use be in the best interests of the public welfare and the neighborhood development of the area." KCC 19.08.050. In this case, King County refused to grant Plaintiffs' preliminary plat application because of the inadequate access to the plat.[4] The County's concerns about access were not "clearly arbitrary and unreasonable having no substantial relation to the public health, safety, morals, or general welfare." Sinaloa Lake, 882 F.2d 1407. Thus, the Court

---

[4] Plaintiffs allege that the County inappropriately relied on its unwritten "100-lot limit" in denying Plaintiffs' preliminary plat application. The Zoning and Subdivision Examiner's Revised Report and Recommendation contradicts Plaintiffs' contention. See Finding No. 8, Exhibit 4 to Macri Declaration ("In view of the absence of an adopted regulation ..., King County cannot apply [the 100-lot limit], or any other, specific limit ..."). At any rate, whether the County's alleged reliance on its unwritten policy violated existing state law is a different issue than whether the County's actions violated federal substantive due process.

HOLDS as a matter of law that Plaintiffs in this case cannot demonstrate a violation of federal substantive due process, and the Court GRANTS summary judgment in favor of Defendant on Plaintiffs' § 1983 claim to the extent it is based on substantive due process.

C. Takings/Inverse Condemnation

The Court does not have jurisdiction over claims that are not ripe. Austin v. City & County of Honolulu, 840 F.2d 678, 682 (9th Cir.), cert. denied, 488 U.S. 852 (1988). A federal takings claim is not ripe until the property owner has sought and been denied "compensation through state procedures, including an inverse condemnation action in state court, provided those procedures are adequate." Id. at 680. "The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194, 105 S. Ct. 3108, 87 L. Ed. 2d 126, 143 (1985). Thus, no federal constitutional violation occurs until the state denies just compensation. Sinaloa Lake, 882 F.2d at 1402; see also Bateson v. Geisse, 857 F.2d 1300, 1306 (9th Cir. 1988) Picard v. Bay Area Regional Transit Dist., 823 F. Supp. 1519, 1522-23 (N.D. Cal. 1993). Here, because Defendant removed the action to federal court, Plaintiffs have not yet pursued relief in the state courts, and the Court lacks subject matter jurisdiction over Plaintiffs' federal takings claim. See Picard, 823 F. Supp. at 1523. The Court therefore DISMISSES Plaintiffs' federal takings claim pursuant to Fed R. Civ. P. 12(h) (3).[5]

[5] Neither party raised the issue of ripeness with regard to Plaintiffs' federal takings claim; however, because ripeness is a matter of jurisdiction, the Court sua sponte has addressed the issue.

As to Plaintiffs' state inverse condemnation claim, the Court must decide whether to exercise supplemental (pendent) jurisdiction over that claim.[6] Supplemental jurisdiction exists when the state claims "are so related to claims in the action within [the Court's] original jurisdiction that they form part of the same case or controversy." 28 U.S.C. § 1367(a). The Court may decline to exercise supplemental jurisdiction over a state claim if the Court has dismissed all claims over which it had original jurisdiction. 28 U.S.C. § 1367(c) (3). Here, the Court has granted summary judgment against Plaintiffs on their federal substantive due process claim, has denied Plaintiffs' motion to amend the complaint to add a federal equal protection claim, and has dismissed Plaintiffs' federal takings claim as not ripe for review. Thus, no claims remain in this action over which the Court has original jurisdiction and the Court declines to exercise supplemental jurisdiction over Plaintiffs' state inverse condemnation claim.[7] The Court therefore REMANDS this case to the state court for further proceedings. 28 U.S.C. § 1447(c).

---

[6] The Ninth Circuit's holdings in Austin and Bateson imply that the landowner must initiate and prosecute a state inverse condemnation action in state court. See Austin, 840 F.2d at 680; Bateson, 857 F.2d at 1306. These cases appear to preclude a federal court from asserting pendent jurisdiction over a state inverse condemnation claim; however in Sinaloa Lake, the Ninth Circuit indicated in a footnote that, in the interest of judicial economy, a federal court could assert supplemental jurisdiction over a state law taking claim. Sinaloa Lake, 882 F.2d at 1404 n.4. In Picard, the District Court decided to exercise supplemental jurisdiction over the state law taking claim at issue, citing both Sinaloa Lake and 28 U.S.C. § 1367, which took effect on December 1, 1990, after the Ninth Circuit issued its opinion in Sinaloa Lake. Picard, 823 F. Supp. at 1526-28. Thus, the Court does not read Austin and Bateson as precluding a federal court from hearing a state inverse condemnation claim.

[7] The parties have presented numerous arguments to the Court with regard to Plaintiffs' takings claims. As the Court declines to assert supplemental jurisdiction, the Court does not reach the merits of Plaintiffs' claims.

IT IS SO ORDERED.

The Clerk of the Court is directed to send uncertified copies of this order to all counsel of record.

Dated this 5th day of June, 1995.

/s/ Thomas S. Zilly
THOMAS S. ZILLY
UNITED STATE DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOE A. MACRI; LOUISE MACRI; JOE F. MACRI; AND ELEANOR MACRI,

Plaintiffs-Appellants

v.

KING COUNTY, a political subdivision of the State of Washington,

Defendant-Appellee.

_____/

No. C94-305Z

MINUTE ORDER

(Filed July 29, 1994)

The following Minute Order is made by direction of the Court, the Honorable Thomas S. Zilly, U.S. District Judge:

(1) Defendant's motion to dismiss plaintiffs' claim under RCW 64.40, docket no. 12 at page 22, is GRANTED. Plaintiffs' claim must be dismissed for failure to comply with the applicable statute of limitations contained in RCW 64.40.030. R/L Associates v. Seattle, 73 Wn. App. 390 (1994).

(2) Plaintiffs' motion for summary judgment, docket no. 10, is DENIED. The Court concludes that the doctrine of collateral estoppel does not apply in this case. A finding of "arbitrary and capricious" under RCW 64.40.020 does not establish liability under 42 USC § 1983. This issue

will be controlled by federal rather than state law. Missouri v. Hunger, 459 U.S. 359, 368, 74 L.Ed.2d 535 (1983). The Ninth Circuit has established demanding standards for determining whether a zoning ordinance has failed to comport with substantive due process. Southern Pacific v. City of Los Angeles, 922 F.2d 498 (9th Cir. 1990). See also Harding v. County of Door, 870 F.2d 430 (7th Cir. 1989). There are material issues of fact which preclude summary judgment on plaintiffs' Section 1983 claims.

(3) The parties are directed to show cause, within ten (10) days, why plaintiffs' third cause of action for inverse condemnation should not be remanded to state court pursuant to Bateson v. Geisse, 857 F.2d 1300, 1305-1306 (9th Cir. 1988).

(4) The Clerk of the Court is directed to send a copy of this Minute Order to all counsel of record.

Filed and entered this 29th day of July, 1994.

BRUCE RIFKIN, Clerk

By /s/
Casey Condon
Deputy Clerk

APPENDIX D

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

JOE A. and LOUISE MACRI and JOE F. and ELEANOR MACRI, SR.,

Plaintiffs,

vs.

KING COUNTY, a political subdivision of the State of Washington and the KING COUNTY COUNCIL,

Defendants..

No. 92-2-04442-1

ORDER ON REVIEW

(Filed January 7, 1994)

_____/

The return of plaintiffs' writ of review was assigned to the undersigned for hearing and disposition. Richard B. Sanders and Eric Stahlfield represented the plaintiff whereas King County Prosecuting Attorney through Kevin Wright represented the defendants. This court considered the following:

1. Return to Writ of Certiorari comprised of various documents and exhibits forming a portion of the record of this case.

2. A Verbatim Transcript of proceedings had in this matter before the Hearing Examiner and the King County Council.

3. Plaintiffs' Brief and Amended Plaintiffs' Brief.

4. Defendant's Brief and Corrected Defendant's Brief.

5. Plaintiffs' Reply Brief.

This court heard oral argument on December 28, 1993 at which time both parties referenced County action on the Zimmer Short Plat, a parcel of property in the vicinity of the subject property. The court considered and granted over objection plaintiffs' motion to file a post-hearing supplement to the record regarding the Zimmer Short Plat; however this court concludes plaintiff is entitled to the relief afforded by this order without reference to the Zimmer Short Plat.

Based upon a thorough review of the record properly before it this court summarizes its conclusions and findings as follows:

1. Jurisdiction on Review. This matter comes before the court on a writ to review Ordinance No. 10252 adopted by the King County Council on January 27, 1992 which denied the Preliminary Plat of El Cove designated by Building and Land Development Division File No. S90P0025.

2. Standard of Review. This court reviews the action of the King County Council pursuant to RCW 58.17.180 to determine whether the decision disapproving the plat was unlawful, arbitrary, capricious and applies the lawfully required standard of review to the action of the King

County Council which incorporated Findings and Conclusions contained in the revised report of the Zoning and Hearing Examiner dated November 22, 1991.

3. Nature of Proposed Plat. Plaintiffs Macri submitted a complete application to subdivide the subject property into 12 residential lots by filing same with King County in 1990 and paying all requisite fees. Thereafter the proposal was revised in minor respects to reduce the number of proposed lots from 12 to 11 and in other minor respects which are not here material. The subject property is comprised of approximately 3.1 acres and is located and generally between S.E. 262nd St. and S.E. 260th St. (if extended) and generally between 200th Ave. S.E. and 201st Ave. S.E. (if both road were extended) east of Kent in unincorporated King County. Macri proposed that the parcel be subdivided as single family residential building lots in a manner consistent with all applicable King County Code requirements.

4. Street Access. The 200th Ave. S.E. corridor provides adequate access to El Cove. Said corridor is identified by County Road Standards as a neighborhood collector designed to service over 50 single family dwelling units. This corridor has ample capacity to provide vehicular access to El Cove.

5. Hundred Lot Rule of Thumb. In 1992, subsequent to all relevant proceedings herein, the King County Council adopted Ordinance 10435 providing "no residential neighborhood collector street shall serve more than 100 lots or dwelling units unless said residential neighborhood collector street is connected in at least two locations with another public roadway that functions at a level consistent with Chapter 2.03." That ordinance, however, does not apply to this proposal to subdivide El Cove by the plaintiff which was filed substantially before its

enactment. However the court finds that the County essentially denied the El Cove plat application through a retroactive application of this ordinance which at all times material to these proceedings was no more than an informal unwritten "rule of thumb" not adopted by ordinance, resolution, formally adopted policy, or comprehensive plan provision.

6. Determination of Nonsignificance. This plat was subject to environmental review under the State Environmental Policy Act. King County determined on September 18, 1990 that same does not have a probable significant adverse impact on the environment and published a final threshold determination on or about that date to that effect which was not subject to subsequent review.

7. Plat Complies with all Legal Standards. El Cove Plat complies with all applicable legal standards lawfully imposed by King County and/or the State of Washington. This court does not construe the face of the findings adopted by the King County Council to the contrary and finds no requisite support in the record to justify a factual finding that the El Cove Plat does not comply with all objective legal standards.

8. Rule of Thumb does not have Force of Law. The so-called 100 lot limit rule of thumb does not have the force of law nor has it been consistently applied.

9. 100 Lot Rule of Thumb Arbitrary on Face and as Applied. The 100 lot rule of thumb was arbitrarily and irrationally applied to justify denial of the El Cove subdivision. The rule of thumb was arbitrary and irrational on its face and as applied. Application of the rule of thumb to this project was in disregard of the facts and circumstances of this proposal and not supported by requisite factual findings nor evidence in the record.

10. Lack of Nexus. Denial of the El Cove Plat because it is accessed by a dead-end street bears no reasonable much less substantial relationship to the attributes or consequences of this proposed subdivision which are themselves insignificant. However denial of the plat on this basis would shift the entire public responsibility to provide connecting roads disproportionately to the shoulders of a small land owner who did not create the alleged problem, did not substantially contribute to the alleged problem, and therefore cannot be required to cure the alleged problem as a condition precedent to the development of his property. This court concludes that such condition or denial takes the owner's property contrary to Constitution Article I, § 16 and the United State Constitution Amendments Fourteen and Five.

11. Unduly Oppressive. This court concludes that denial of the proposal under the circumstances of this case is unduly oppressive to the land owner, is arbitrary, irrational, and deprives the owner of his property absent that lawful process due under the Fourteenth Amendment to the United States Constitution. It is reversible error under the statutory standard of review.

WHEREFORE this court does now ORDER, ADJUDGE AND DECREE as follows:

King County Ordinance 10252 denying the El Cove Plat should be and hereby is reversed because same is unlawful, arbitrary, capricious, deprives the owner property without due process, takes the owner's property without compensation and without legitimate public purpose. This matter is remanded to the King County Council with instructions to grant the preliminary approval of the plat conditioned only as set forth in the Revised Report and Recommendation to the King County Council of the Hearing

Examiner dated November 22, 1991, pp. 8-11. Plaintiff is awarded his statutory costs in an amount to be taxed according to law.

DONE IN OPEN COURT this 7 day of January, 1994.

/s/
JUDGE

Presented By:

/s/ Richard B. Sanders
RICHARD B. SANDERS, WSBA # 2813
Attorneys for Plaintiffs

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOE A. MACRI; LOUISE MACRI; JOE F. MACRI; AND ELEANOR MACRI,

Plaintiffs-Appellants

v.

KING COUNTY, a political subdivision of the State of Washington,

Defendant-Appellee.

/

No. 95-35709
D.C. No.
CV 94-305-TSZ

ORDER

United States Court of Appeals,
Ninth Circuit.
Argued and Submitted August 9, 1996.

Decided April 21, 1997.
Amended September 17, 1997.

Appeal from the United States District Court for the Western District of Washington, Thomas S. Zilly, District Judge, Presiding. D.C. CV 94-305-TSZ.

Before: BEEZER and O'SCANNLAIN, Circuit Judges, and BROWNING, District Judge. [1]

ORDER

[1] The Honorable William D. Browning, United States District Judge for the District of Arizona, sitting by designation.

The Opinion filed on April 21, 1997, is amended as follows:

1. On slip opinion, page 4628, line 23, replace "and" with "or."

2. On slip opinion, page 4630, line 20 replace all text beginning with "Appellants argue" and ending with "R/L Associates" on page 4631, line 18, with the following:

> However, while the Council's action would have been the final administrative remedy if Appellants had done nothing, Appellants brought an action in King County Superior Court on February 26, 1992, specifically for the purpose of overturning what Appellants claimed was arbitrary and capricious action by the Council. The superior court ruled in Appellants' favor on January 7, 1994, and ordered the County to approve the application. Appellants are correct that, under these facts, there administrative remedies were not exhausted until February 28, 1994, when, pursuant to the superior court's order on Appellant's writ of certiorari, the County Council finally approved the preliminary plat application. *See Hayes v. City of Seattle*, 131 Wash. 2d 706, 934 P.2d 1179, 1183-84 (1997). However, Appellants filed their claim for damages under Wash. Rev. Code § 64.40 on February 4, 1994, more than three weeks *before* the County Council finally approved the preliminary plat application. Appellants claim was therefore unripe under the plain language of § 64.40.030, which explicitly

states that actions must be "commenced only within thirty days *after* all administrative remedies have been exhausted." Wash. Rev. Code § 64.40.030 (emphasis added). This conclusion is supported by the decision of the Washington Supreme Court in *Hayes*, which noted that "final action on [applicant's] request for a permit did not occur until the City Council ultimately approved his application [following judicial review of the Council's initial determination] ...." *Hayes*, 934 P.2d at 1184. Consequently, Appellants' claim under § 64.40 was properly dismissed by the district court as untimely, not for the reason that it exceeded the limitations period, however, but because it was unripe.

3. On slip opinion, page 4631, line 29, replace "limitations reasons" with "the reason that Appellants' claim was untimely."

With these amendments, the panel has voted to deny Appellants' petition for rehearing. Judge O'Scannlain has voted to reject the suggestion for rehearing en banc and Judge Beezer and Judge Browning so recommend.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R.App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Supreme Court, U.S.
FILED
JAN 21 1998
CLERK

No. 97-1028

In The

Supreme Court of the United States

October Term, 1997

JOE A. MACRI; LOUISE MACRI; JOE F. MACRI and ELEANOR MACRI,

Petitioners,

vs.

KING COUNTY, a political subdivision of the State of Washington,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Should this Court issue an advisory opinion regarding the relationship between a Fifth Amendment taking claim and a Fourteenth Amendment substantive due process claim in a case where petitioners have already both obtained the invalidation of a land use regulation and been paid compensation for the financial losses they incurred as a result of the regulation?

2. Should this Court address whether petitioners' Fifth Amendment taking claim was properly dismissed on ripeness grounds, when this issue is moot because petitioners' Fifth Amendment taking claim is now ripe, with or without action by this Court?

3. Should this Court address whether petitioners' Fifth Amendment taking claim was properly dismissed on ripeness grounds, when this claim is moot because petitioners have already been compensated for the taking of their property?

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Contents	ii
Table of Citations	ii
Statement of the Case	1
Reasons for Denying the Writ	3
I. The Issues Petitioners' Seek To Raise Are Not Properly Raised In This Case.	4
II. Petitioners Are Incorrect When They Assert Invalidation Is Not Available Under A Taking Claim.	6
III. The Ninth Circuit's Decision In This Case Does Not Evidence A Significant And Direct Conflict With Either The Decisions Of Other Circuits Or This Court's Jurisprudence.	8
Conclusion	11

TABLE OF CITATIONS

Cases Cited:

Agins v. Tiburon, 447 U.S. 255 (1979) 7

Armendariz v. Penman, 75 F.3d 1311 (9th Cir. 199) 1, 2, 4, 7 8, 9, 10

Contents

Page

DeBlasio v. Zoning Bd. of Adjustment, 53 F.3d 592 (3rd Cir. 1995) 8, 9, 10

Dollan v. City of Tigard, 512 U.S. 374 (1994) 7

Graham v. Connor, 490 U.S. 386 (1989) .. 1, 2, 3, 4, 8, 9, 10

Guimont v. Seattle, 77 Wash. App. 74, 896 P.2d 70 (1995) 6

Hodel v. Irving, 481 U.S. 704 (1987) 7

Macri v. King County, 126 F.3d 1125 (9th Cir. 1997) 1, 2, 4, 5, 6

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) 7

Pearson v. City of Grand Blanc, 961 P.2d 1211 (6th Cir. 1992) 8

Tri County Industries v. District of Columbia, 104 F.3d 455 (D.C. Cir. 1997) 9

Williamson County Regional Planning Comm's v. Hamilton Bank, 473 U.S. 172 (1985) 6

United States Constitution Cited:

Fifth Amendment ..... i, 1, 2, 4, 5, 6, 7, 8, 10

Fourteenth Amendment ..... i, 1, 2, 3

STATEMENT OF THE CASE

This case arises out of petitioners' application to subdivide 3.1 acres of real property located in unincorporated King County into 11 building lots. *Macri v. King County*, 126 F.3d 1125, 1127 (9th Cir. 1997). King County denied petitioners' subdivision application. *Id.* Petitioners sued in state court and obtained an order invalidating the County's denial of their subdivision application. *Id.* Pursuant to the order of the state court, King County approved petitioners' subdivision application. *Id.*

Subsequent to the state court action, petitioners filed the instant action seeking compensation for the alleged violation of their constitutional rights occasioned by the denial of their subdivision application.[1] The district court dismissed petitioners' federal taking claim seeking compensation under the Fifth Amendment on ripeness grounds, since petitioners had not yet sought compensation under state law. *Id.* The district court also granted summary judgment dismissing petitioners' claim that the County's denial of their subdivision application violated their substantive due process rights. *Id.* Finally, the district court dismissed petitioners' state law claims, with the exception of petitioners' state taking claim, which the district court remanded to state court for resolution. *Id.*

On appeal, the Ninth Circuit affirmed. *Id.* at 1131. The Ninth Circuit affirmed the dismissal of petitioners' substantive due process claim by applying *Graham v. Connor*, 490 U.S. 386 (1989) and *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) to conclude that the due process clause of the Fourteenth

---

1. While petitioners have sued King County to try to collect money for the County's allegedly unconstitutional delay in approving their subdivision application, petitioners have done nothing to try to actually develop their property. *See Macri*, 126 F.3d at 1127.

Amendment provides no substantive protection for petitioners, whose claim falls within the ambit of the explicit textual protection afforded by the Fifth Amendment's taking clause. *Id.* at 1128-29. Petitioners then filed their Petition for Writ of Certiorari with this Court. *See* Petition for Writ of Certiorari (hereinafter Petition).

Three facts in this case bear emphasis. First, petitioners' substantive due process claim in this case has been adjudged to be without merit. Petitioners complain that the Ninth Circuit dismissed their substantive due process claim on the basis of *Graham* and *Armendariz*, rather than reaching the merits of their claim. *See, e.g.*, Petition at 6-8. The district court in this case, however, did reach the merits of petitioners' substantive due process claim. *Macri*, 126 F.3d at 1127. The district court dismissed petitioners substantive due process claim on the ground that it has no merit. *Id.* Therefore, even if dismissal of petitioners' substantive due process claim pursuant to *Armendariz* was error, it was harmless error, because petitioners' substantive due process claim has been adjudged to be without merit, in any event.

Second, petitioners have already obtained invalidation of the land use regulation that they allege violated their constitutional rights in this matter. *See id.* Petitioners sued in state court and succeeded in invalidating the County's denial of their subdivision application. *Id.* Subsequently, King County approved petitioners' subdivision application. *Id.*

Petitioners filed the instant action seeking only money. *See id.* Therefore, when petitioners complain in their Petition that some litigants might assert a substantive due process claim in order to obtain invalidation of a land use regulation, and not compensation, they are speaking about a hypothetical litigant other than themselves. *See* Petition at 20-23. In this case, petitioners seek only compensation. *See Macri*, 126 F.3d at 1127.

Third, petitioners have been compensated for the taking of their property. Following the district court's order in this case, the parties voluntarily settled petitioners' state taking claim. *Id.* Therefore, petitioners' argument that their federal taking claim should not have been dismissed on ripeness grounds is moot. Petitioners voluntarily settled their state taking claim, and have not asserted that their remedy under state law was inadequate to fully compensate them for the taking of their property.

REASONS FOR DENYING THE WRIT

Petitioners argue that this Court should accept review in this case in order to resolve a significant and direct conflict between the circuits and between the Ninth Circuit's decision in this case and this Court's jurisprudence. *See* Petition at 9-23. Petitioners urge this Court to accept review in this case and announce that invalidation of an unconstitutional land use regulation pursuant to the due process clause of the Fourteenth Amendment is still available following this Court's decision in *Graham v. Connor*. *See id.* at 23, 26. Petitioners also urge this Court to reverse the Ninth Circuit's decision to affirm the district court's dismissal of petitioners' federal taking claim on ripeness grounds. *See id.* at 26-28.

While petitioners' raise interesting theoretical issues in their Petition, these issues have no application to the facts of this case. There is, therefore, no reason for this Court to take review of the Ninth Circuit's decision in this case.

I.

THE ISSUES PETITIONERS' SEEK TO RAISE ARE NOT PROPERLY RAISED IN THIS CASE.

Petitioners criticize the Ninth Circuit's decision in this case on two theoretical grounds. One of these grounds concerns the remedies available to a plaintiff in a case addressed by the Fifth Amendment's taking clause. *See* Petition at 20-23. The other ground concerns the ripeness of a federal taking claim seeking invalidation of a land use regulation. *See id.* at 26-28.

The first objection petitioners raise to the Ninth Circuit's decision in this case concerns the dismissal of their substantive due process claim. *See id.* at 20-23. The Ninth Circuit, applying *Armendariz v. Penman* and *Graham v. Connor*, determined that the explicit protection afforded by the taking clause of the Fifth Amendment in the context of this case preempts the more generalized, implicit substantive protections courts have occasionally found in the due process clause. *Macri*, 126 F.3d at 1128-29.

Petitioners object that, since the only remedy for a taking is the payment of just compensation, it is improper to subsume substantive due process claims under a Fifth Amendment taking analysis. *See* Petition at 20-23, 26. Some litigants may be seeking the invalidation of a land use regulation, and they should not be relegated to the remedy of just compensation.[2]

Even if this were true, it would have no application to petitioners. Petitioners seek only compensation in this case. *See*

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2. Aside from the present point that petitioners' objection has no application to the facts of this case, petitioners' objection is also premised upon an incorrect understanding of the law. Government regulations can be, and have been, invalidated pursuant to a taking claim. *See* Point II, *infra* at 6-8.

Macri, 126 F.3d at 1127. A discussion of whether some other litigant ought to be able to obtain the invalidation of a land use regulation has no place in this case.

The second objection petitioners raise to the Ninth Circuit's decision in this case concerns the dismissal of their federal taking claim on ripeness grounds. *See* Petition at 26-28. Petitioners object that it is improper to require all litigants to first seek compensation under state law before asserting a taking claim under the Fifth Amendment. Some litigants might be seeking the invalidation of an unconstitutional land use regulation. Petitioners argue that such litigants should not first have to seek compensation under state law before asserting a federal taking claim. *See id.* at 27.

Again, even if this were true, it has no application to petitioners. Petitioners seek only compensation. *See Macri*, 126 F.3d at 1127. If they receive compensation under state law, the constitutional wrongs they allege will have been fully remedied.

Moreover, petitioners' argument about the ripeness of their federal taking claim is moot in two separate senses. It is moot because petitioners' federal taking claim is now ripe, with or without action by this Court. The district court found petitioners' federal taking claim to be unripe on the ground that petitioners had not yet sought compensation under state law. *Macri*, 126 F.3d at 1127. Following the district court's order in this case, petitioners settled their state taking claim. *Id.* Since they have now sought (and obtained) compensation under state law, there is nothing further petitioners must do to make their federal taking claim ripe. It is not necessary for this court to determine whether petitioners' federal taking claim was properly dismissed on ripeness grounds. This question is moot.

Petitioners argument that their federal taking claim was improperly dismissed on ripeness grounds is also moot because they have been compensated for the taking of their property.

Petitioners settled their state taking claim and have not argued that the remedy for the taking of their property provided by state law was inadequate.[3] *See Macri*, 126 F.3d at 1127. The propriety of the disposition of petitioners' federal taking claim is moot, since they have been fully compensated for the taking of their property.

If this Court is inclined to review the theoretical arguments petitioners attempt to raise, this Court should await a case in which these concerns are actually issues. This is not such a case.

II.

PETITIONERS ARE INCORRECT WHEN THEY ASSERT INVALIDATION IS NOT AVAILABLE UNDER A TAKING CLAIM.

Much of petitioners' argument is premised upon their belief that invalidation is not an available remedy under a taking claim. *See* Petition at 20-23. Petitioners are incorrect.

If private property is taken for a public use, then the Fifth Amendment requires the payment of just compensation. *See* United States Const. Amend. V. As petitioners indicate, many cases recite that the constitution does not prohibit a government from taking private property for a public use. *See* Petition at 17. Under such circumstances, the constitution only requires that just compensation be paid. *Williamson County Regional Planning Comm's v. Hamilton Bank*, 473 U.S. 172, 194 (1985).

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3. Petitioners could not maintain such an argument, both because they voluntarily accepted the adequacy of their state law taking remedy and because Washington courts interpret the taking clause in the Washington State Constitution to provide protection that is identical to that provided by the Fifth Amendment taking clause in the United States Constitution. *See Guimont v. Seattle*, 77 Wash. App. 74, 79, 896 P.2d 70 (1995).

The just compensation remedy does not, however, exhaust the remedies potentially available under a taking claim. The necessary implication of the requirement that just compensation be paid when private property is taken for a public use is that private property cannot be taken for a private use, or for no valid purpose, at all. *Armendariz*, 75 F.3d at 1324.

A land use regulation effects a taking if the regulation does not "substantially advance legitimate state interests." *Agins v. Tiburon*, 447 U.S. 255, 260 (1979). In such a case, the constitutionality of the regulation may not be saved by the payment of just compensation. *Armendariz*, 75 F.3d at 1320, n.5. Rather, the remedy for a land use regulation that affects a taking by failing to substantially advance a legitimate state interest is invalidation. *See Dollan v. City of Tigard*, 512 U.S. 374 (1994) (permit condition requiring dedication of property invalidated on grounds dedication not roughly proportional to impact from development); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (decision of California State Court of Appeal reversed on the basis of the Fifth Amendment taking clause, reinstating superior court decision striking down permit condition); *Hodel v. Irving*, 481 U.S. 704 (1987) (federal statute restricting descent or devise of Indian lands invalidated as a taking); *Armendariz*, 75 F.3d at 1320, n.5 (Fifth Amendment taking clause prohibits private taking, which "cannot be constitutional even if compensated").

When it is recognized that invalidation is available under a taking claim, then petitioners' argument loses its steam. Petitioners urge this Court to reverse the Ninth Circuit's decision in the instant case in order to maintain a litigant's ability to obtain the invalidation of land use regulations (pursuant to a substantive due process claim). *See* Petition at 20-23. Since invalidation is available under a taking claim in a proper case, there is no need to maintain the availability of the more

subjective, generalized protection afforded by a substantive due process claim in a case that is addressed by the explicit protection provided by the Fifth Amendment taking clause. The Ninth Circuit's decision in this case was correct.

III.

THE NINTH CIRCUIT'S DECISION IN THIS CASE DOES NOT EVIDENCE A SIGNIFICANT AND DIRECT CONFLICT WITH EITHER THE DECISIONS OF OTHER CIRCUITS OR THIS COURT'S JURISPRUDENCE.

Petitioners argue that there is a significant and direct split in the circuits with respect to the application of substantive due process claims asserted in the land use context. *See* Petition at 9-16. Petitioners imply that this split in the circuits is relevant to the Ninth Circuit's decision in this case. It is not.

Petitioners cite to the Sixth Circuit's decision in *Pearson v. City of Grand Blanc*, 961 P.2d 1211 (6th Cir. 1992) to support their claim that there is a split in the circuits. Petition at 12-14. *Pearson* does gather substantive due process cases in the land use context from the various circuits and concludes the circuits are split. *Pearson*, 961 F.2d at 1217-19. This split, however, has nothing to do with the Ninth Circuit's decision in this case or, for that matter, the Ninth Circuit's en banc decision in *Armendariz* applying *Graham v. Connor* to private takings. *Pearson* stands for the proposition that the circuits take different approaches to substantive due process claims in the land use context generally, quite apart from and indeed prior to the Ninth Circuit's decision in *Armendariz*. *See Pearson*, 961 F.3d at 1217-19.

Petitioners also cite to *DeBlasio v. Zoning Bd. of Adjustment*, 53 F.3d 592 (3rd Cir. 1995) to attempt to show a

significant and direct conflict in the circuits. *See* Petition at 15-16. *DeBlasio*, however, doesn't even mention *Graham*, let alone stand for the proposition that the Third Circuit has considered and rejected the Ninth Circuit's approach under *Armendariz*.

Finally, petitioners cite *Tri County Industries v. District of Columbia*, 104 F.3d 455 (D.C. Cir. 1997) in support of their claim that there is a significant and direct split among the circuits. *Tri County* is a case in which a substantive due process claim in the land use context is referred to as "oxymoronic" and is dismissed as a matter of law. *See Tri County*, 104 F.3d at 459.

Petitioners are unable to demonstrate that there is a "significant and direct" split among the circuits, which requires this Court's attention. Particularly with respect to the facts and issues presented in this case, petitioners have shown no relevant split among the circuits.

Petitioners also claim that the Ninth Circuit's decision in this case conflicts with this Court's jurisprudence. Petitioners, however, have not cited a single case in which this Court has found a violation of substantive due process in a land use or zoning case. *See* Petition at 17-23. Furthermore, petitioners cite only cases this Court decided prior to *Graham v. Connor* to support the proposition that a land use regulation could potentially violate substantive due process. *See id.* Petitioners have not established the existence of a conflict between the Ninth Circuit's decision in this case and this Court's jurisprudence.

The fact that decisions of this Court prior to this Court's decision in *Graham v. Connor* stated that it was possible that a violation of substantive due process could occur in the land use context is unremarkable. Further, this is hardly a circumstance that justifies review in this case. Likewise, the fact

that some circuits since this Court's decision in *Graham* have continued to recognize the possibility that a land use regulation could violate substantive due process is unremarkable, as well. *See, e.g., DeBlasio*, 53 F.3d 592 (3rd Cir. 1995). Petitioners have cited no cases that have discussed the Ninth Circuit's decision in either *Armendariz* or in the instant case and have explicitly refused to follow it on similar facts.

As far as the instant case is concerned, petitioners have not pointed to any evidence that even suggests that any court would have decided petitioners' substantive due process claim differently than the Ninth Circuit decided it. At most, petitioners have suggested that another circuit might have reached the same result via a different analysis. It is not necessary for this Court to insert itself into the process by which the circuits are coming to grips with the application of *Graham v. Connor* in the context of claims within the ambit of the Fifth Amendment's taking clause in order to enforce orthodoxy in a case, such as the instant case, that all agree is without merit.

The district court in this case determined that petitioners' substantive due process claim is without merit. Further, since petitioners seek only compensation in this case and have in fact been compensated for the alleged taking of their property, there is no reason for this Court to accept review in this case in order to address the theoretical questions petitioners wish to raise.

CONCLUSION

King County respectfully requests that this Court deny the Petition for Writ of Certiorari filed by petitioners in this case.

Respectfully submitted,

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MOTION FILED

JAN 21 1998

No. 97-1028

In the

Supreme Court of the United States

October Term, 1997

JOE A. MACRI; LOUISE MACRI;
JOE F. MACRI; and ELEANOR MACRI,
Petitioners,

v.

KING COUNTY, a political
subdivision of the State of Washington,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, THE BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, THE CALIFORNIA FARM BUREAU FEDERATION, THE OREGON BUILDING ASSOCIATION, AND THE WASHINGTON ASSOCIATION OF REALTORS® IN SUPPORT OF PETITIONERS, MACRI

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, THE BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, THE CALIFORNIA FARM BUREAU FEDERATION, THE OREGON BUILDING ASSOCIATION, AND THE WASHINGTON ASSOCIATION OF REALTORS® IN SUPPORT OF PETITIONERS, MACRI

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae on behalf of itself, the Building Industry Association of Washington, the California Farm Bureau Federation, the Oregon Building Industry Association, and the Washington Association of REALTORS®.[1] Consent to file this brief has been granted by counsel for petitioner and has been lodged with the Clerk of this Court. Respondent, King County, has withheld consent, necessitating the filing of this motion.

IDENTITY AND INTEREST OF AMICI CURIAE

The Building Industry Association of Washington (BIAW) is a trade association representing more than 7,300 members engaged in commercial and light industrial construction and the building of most of Washington's residential housing. Many of BIAW's members frequently make application to the government for approval of development projects. If the government is free to act

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[1] Pursuant to Supreme Court Rule 37.6, amici curiae affirm that no counsel for any party in this case authored this brief in whole or in part; and furthermore, that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

irrationally so long as it pays compensation, its members will have lost a valuable constitutional protection.

The California Farm Bureau Federation (Farm Bureau) is a nonprofit, voluntary membership corporation organized under the laws of the State of California for the purpose of fostering agriculture and working to resolve those problems facing the agricultural community. Its members are 53 county farm bureaus through which it represents nearly 80,000 families in 56 California counties and more than 80% of the commercial farmers in the State of California.

California farmers are constantly faced with serious overregulation from governmental agencies having authority over some of their land use activities. For example a substantial number of the Farm Bureau's members conduct agricultural activities on farmlands that contain habitat for protected wildlife and plant species. These activities are subject to regulation by state and federal agencies under the state and federal Endangered Species Acts. Also, many members conduct agricultural activities on farmland characterized as wetlands that are subject to regulation under the state and federal Clean Water Acts. Farm Bureau members' farming activities have been seriously overregulated under these and other statutes by governmental agencies' arbitrary and capricious actions. For example, in some cases the government has prohibited the planting of crops on agriculturally zoned lands and even dictated how the land may be used for livestock grazing. In other cases, the government has created new zoning classifications that require agricultural landowners to take land out of production to feed and shelter wildlife. These actions violate the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution yet, under the Ninth Circuit's decision in this case, Farm Bureau members

have no right to challenge these wrongs for violating their due process rights. This denial of their rights severely diminishes opportunities for meaningful constitutional relief.

The Oregon Building Industry Association (OBIA) represents the interests of 5,200 builders, developers, and contractors in the State of Oregon. OBIA works with its local associations to meet the housing needs and quality of life for all Oregonians. Like BIAW, OBIA is concerned that the Ninth Circuit's decision in *Macri* will allow governments to act arbitrarily in the processing of its members' land use applications.

The Washington Association of REALTORS® represents 16,000 independent real estate agents and brokers in the State of Washington. The Association works to promote the success of its members through advocacy of a favorable legislative climate, coordination of uniform professional standards enforcement, identification of resources required to meet the needs of the marketplace, and various communication efforts. In this case, the Association seeks to ensure that there is a legal climate which protects the rights of property owners from arbitrary and capricious government regulatory actions.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has over 20,000 contributors and supporters located throughout the country and maintains its principle office in Sacramento, California, with other offices in the States of Washington, Hawaii, and Florida. Policy is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board evaluates the merits of any

contemplated legal action and authorizes such action only when the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

PLF has participated in numerous cases involving issues arising under the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. PLF attorneys were counsel of record in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659 (1997), and PLF participated as amicus curiae in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

Amici seek here to augment the argument in the petition for writ of certiorari by providing evidence of additional conflicts and confusion among the circuits. Additionally, PLF will address the inadequacy of just compensation as a remedy, the textual and historical underpinnings of the Due Process Clause, and establish that this Court has consistently applied substantive due process protections to property owners. PLF's public policy perspective and litigation experience in support of private property rights and individual rights will provide an additional viewpoint with respect to the constitutional issues presented. In particular, PLF is concerned that the Ninth Circuit's decision in this case denies individuals access to the federal courts to seek relief against irrational, arbitrary, and capricious government actions effecting their property.

For the foregoing reasons, amici request this Court to grant their motion to file the attached amicus curiae brief.

DATED: January __, 1998.

Respectfully submitted,

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QUESTIONS PRESENTED FOR REVIEW

1. Does *Graham v. Connor*, 490 U.S. 386 (1989), require that the remedy of just compensation under the Takings Clause of the Fifth Amendment replace and preclude substantive due process claims under the Fourteenth Amendment based on arbitrary and capricious government interference with property?

2. If a claim for relief based on arbitrary and capricious government action interfering with property may only be based on the Fifth Amendment's Takings Clause, is such a claim unripe under *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194 (1985), until the property owner seeks compensation under available state procedures?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES CITED iv

INTERESTS OF AMICI CURIAE 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI TO ADDRESS A SUBSTANTIAL CONFLICT AMONG THE CIRCUITS 3

A. The Third, Sixth, Eleventh, and District of Columbia Circuits Recognize Substantive Due Process Protections for Arbitrary and Capricious Government Actions Affecting Property Interests 4

B. The Tenth Circuit Agrees with the Ninth Circuit in Not Recognizing Substantive Due Process Protections for Arbitrary and Capricious Actions Affecting Property Interests 7

C. The Fifth and Seventh Circuits Are Inconsistent in Their Recognition of Due Process Protections for Arbitrary and Capricious Actions Affecting Property Interests 7

Page

II. THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI TO DECIDE WHETHER THE SUBSTANTIVE COMPONENT OF THE DUE PROCESS CLAUSE PROVIDES ANY PROTECTION AGAINST ARBITRARY AND CAPRICIOUS GOVERNMENT ACTION AFFECTING PROPERTY INTERESTS 10

A. The Fifth Amendment Remedy of Just Compensation Provides Inadequate Relief for Arbitrary and Capricious Government Land Use Regulations 11

B. The Plain Text of the Constitution Provides That a State May Not Interfere with Property Interests Without Due Process 13

C. This Court Has Consistently Found a Constitutional Right Based on the Due Process Clause to Be Free from Arbitrary Government Actions 18

CONCLUSION 19

TABLE OF AUTHORITIES CITED

Page

Cases

Albright v. Oliver, 510 U.S. 266 (1994) 2,6-7,10,19

Armendariz v. Penman, 75 F.3d 1311 (9th Cir. 1996) 1-2,7,10,13-14,17

Bateman v. City of West Bountiful, 89 F.3d 704 (10th Cir. 1996) 7

Bello v. Walker, 840 F.2d 1124 (3d Cir. 1988) 5

DeBlasio v. Zoning Board of Adjustment for the Township of West Amwell, 53 F.3d 592 (3d Cir. 1995) 5

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) 11-12

FM Properties Operating Company v. City of Austin, 93 F.3d 167 (5th Cir. 1996) 9

Gamble v. Eau Claire County, 5 F.3d 285 (7th Cir. 1993) 8-9,12

Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) 19

Graham v. Connor, 490 U.S. 386 (1989) 2-3,6-7,10,19

LRL Properties v. Portage Metro Housing Authority, 55 F.3d 1097 (6th Cir. 1995) 5

Lynch v. Household Finance Corporation, 405 U.S. 538 (1972) 13

Page

Macri v. King County, 110 F.3d 1496 (9th Cir. 1997) 1,3,10,12-13,17

Miller v. Campbell County, 945 F.2d 348 (10th Cir. 1991) . 7

National Paint & Coatings Association v. City of Chicago, 45 F.3d 1124 (7th Cir. 1995) 8

Nectow v. City of Cambridge, 277 U.S. 183 (1928) 11,18-19

Patel v. Penman, 103 F.3d 868 (9th Cir. 1996) 10

Pearson v. City of Grand Blanc, 961 F.2d 1211 (6th Cir. 1992) 3-5

Pearson v. City of Grand Blanc, 756 F. Supp. 314 (E.D. Mich. 1991) 4

Polenz v. Parrott, 883 F.2d 551 (7th Cir. 1989) 7-9

Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981) 11

Schaper v. City of Huntsville, 813 F.2d 709 (5th Cir. 1987) 9

Silverman v. Barry, 845 F.2d 1072 (D.C. Cir. 1988) 6

Sinaloa Lake Owners Association v. City of Simi Valley, 882 F.2d 1398 (9th Cir. 1989) 2,15

Sinclair Oil v. County of Santa Barbara, 96 F.3d 401 (9th Cir. 1996) 10

Soldal v. Cook County, 506 U.S. 56 (1992) 10

Tri County Industries v. District of Columbia, 104 F.3d 455 (D.C. Cir. 1997) 6

United States v. Lanier, 117 S. Ct. 1219 (1997) 10

Page

Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252 (1977) 19

Village of Euclid v. Ambler Realty, 272 U.S. 365 (1926) 11,18

Villas of Lake Jackson, Ltd. v. Leon County, 121 F.3d 610 (11th Cir. 1997) 6

United States Constitution

Fourth Amendment 2,10

Fifth Amendment 1-2,10-11,13,16-18

Fourteenth Amendment 2,11,13-14,16-18

Statutes

42 U.S.C. § 1983 1

Miscellaneous

Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 Geo. L.J. 555 (1997) 3-4,14-15

The Federalist No. 84 (Alexander Hamilton) 15

INTERESTS OF AMICI CURIAE

The interests of amici curiae are set forth in the preceding motion and are adopted herein.

STATEMENT OF THE CASE

The respondent, King County, denied the Macris' preliminary plat application to subdivide their property into 11 residential lots. Approximately four years later, the King County Superior Court held the denial of the application was arbitrary and irrational on its face and in disregard of the facts and circumstances of the Macri proposal.

Subsequently, the Macris filed this action in state court claiming violations of Washington law and seeking damages under 42 U.S.C. § 1983 for a violation of their substantive due process rights stemming from the arbitrary and capricious denial of their plat application. The Macris also raised a Fifth Amendment takings claim alleging the county denial of their plat application failed to substantially advance a legitimate governmental interest. King County removed the action to federal district court where it was dismissed. An appeal was brought before the Ninth Circuit which affirmed the district court.

The opinion of the Ninth Circuit is reported at *Macri v. King County*, 110 F.3d 1496 (9th Cir. 1997). Among other things, the court held that the Macris' constitutional claims were limited to review under the Fifth Amendment's Takings Clause because it provides an explicit constitutional source of protection for the petitioners. The court stated that "substantive due process has no place in this context." The court relied on its own prior opinion in *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996), which held that when an explicit textual

provision of the Constitution protects against the government action, the claim must be analyzed under that specific provision alone and not under the general guarantee of substantive due process. *Armendariz* overruled the Ninth Circuit's opinion in *Sinaloa Lake Owners Association v. City of Simi Valley*, 882 F.2d 1398 (9th Cir. 1989), in which the court recognized both a takings and due process claim. The court overruled *Sinaloa* based upon this Court's opinions in *Graham v. Connor*, 490 U.S. 386 (1989), and *Albright v. Oliver*, 510 U.S. 266 (1994). In those cases, the Supreme Court held that claims that law enforcement officials used excessive force or made an arrest without probable cause are properly analyzed under the Fourth Amendment and not the Due Process Clauses of the Fifth and Fourteenth Amendments.

SUMMARY OF ARGUMENT

The Ninth Circuit has applied this Court's rulings in *Graham* and *Albright* to destroy all substantive due process protections for property rights, thereby adding to a substantial conflict among the circuits. In addition to the Ninth Circuit, the Tenth Circuit prohibits substantive due process claims where the government has acted arbitrarily or capriciously in interfering with property interests. At least four other circuits take a contrary view. This conflict is widespread and well recognized. It is time that this Court harmonize the differing and irreconcilable opinions among the circuit courts of appeals.

This Court should determine whether the substantive component of the Due Process Clause applies to arbitrary and capricious government action affecting property rights. The Ninth Circuit's limited remedy of compensation under the Fifth Amendment Takings Clause is inadequate relief for "improper" government conduct. Moreover, the Constitution expressly provides due process protections for property interests. Indeed, nothing in the language of the Constitution or in its historical

underpinnings suggests that a specific constitutional protection precludes a more general protection. In fact, this Court has consistently recognized a substantive due process protection for property rights. Therefore, this Court should grant the petition for review and reverse the Ninth Circuit opinion in *Macri*.

ARGUMENT

I

THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI TO ADDRESS A SUBSTANTIAL CONFLICT AMONG THE CIRCUITS

There is a clear and widespread conflict among the circuits over the main issue in this case: whether *Graham* prohibits substantive due process protections for property interests.

This conflict is well recognized. As noted by the Sixth Circuit: "The lack of uniformity among the circuits in dealing with zoning cases of the 'arbitrary and capricious substantive due process' category is remarkable." *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1217 (6th Cir. 1992). Professor Krotoszynski of the Indiana University, Indianapolis School of Law, agrees:

> In addition to the Ninth and Eleventh Circuits, several other courts of appeals have addressed . . . the question whether substantive due process protects property interests. Even at the most basic level, there is a remarkable

> inconsistency regarding whether substantive due process protects property interests.

Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 Geo. L.J. 555, 577 (1997).

Equally remarkable, however, is the fact that this Court has yet to deal with the issue:

> Although the Supreme Court has on occasion held that the specific constitutional protection supersedes the more generalized due process protection, it has not ruled on whether the specific takings clause of the Fifth Amendment supersedes the general due process provisions of the Fifth and Fourteenth Amendments.

Pearson v. City of Grand Blanc, 756 F. Supp. 314, 317 (E.D. Mich. 1991).

Attesting to the need for Supreme Court resolution of this issue is the Sixth Circuit's lament in *Pearson*:

> We wish it were within our power to harmonize these decisions, but the conflicts among circuits are too great. Harmony will have to await action by the Supreme Court.

Pearson, 961 F.2d at 1220 n.45.

A. The Third, Sixth, Eleventh, and District of Columbia Circuits Recognize Substantive Due Process Protections for Arbitrary and Capricious Government Actions Affecting Property Interests

The Ninth Circuit's denial of substantive due process protections for property interests is in direct conflict with most of the other circuits that have considered the issue.

The Third Circuit acknowledges that under some circumstances landowners have substantive due process protections for their property interests. In *DeBlasio v. Zoning Board of Adjustment for the Township of West Amwell*, 53 F.3d 592 (3d Cir. 1995), the court approved a substantive due process claim where a local zoning board allegedly reached an irrational decision that an automobile repair shop violated zoning ordinances. The court emphatically concluded:

> Thus, in the context of land use regulation, that is, in situations where the governmental decision in question impinges upon a landowner's use and enjoyment of property, a land-owning plaintiff states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrarily or irrationally reached.

Id. at 601.

The Third Circuit also allowed a substantive due process claim where the government denied a building permit because of the political activities of the applicant. *Bello v. Walker*, 840 F.2d 1124 (3d Cir. 1988).

The Sixth Circuit agrees with the Third Circuit, approving the use of substantive due process to challenge arbitrary or irrational governmental actions. The Sixth Circuit expressly authorizes property owners to challenge adverse zoning decisions under a substantive due process theory. *See LRL Properties v. Portage Metro Housing Authority*, 55 F.3d 1097, 1111 (6th Cir. 1995) (holding that a substantive due process claim may be stated where government conduct "shocks the conscience"). *See also Pearson v. City of Grand Blanc*, 961 F.2d at 1220-22 (recognizing implication of a substantive due process right for arbitrary refusal to grant rezoning request).

Likewise, the Eleventh Circuit recognizes a separate substantive due process claim for arbitrary and capricious governmental action affecting property interests. In *Villas of Lake Jackson, Ltd. v. Leon County*, 121 F.3d 610 (11th Cir. 1997), certain landowners filed a substantive due process action against the county contending the county acted arbitrarily in rezoning the landowners' property to prohibit high-density apartment complexes to which the landowners claimed a vested right. Although the Eleventh Circuit held the county had not acted arbitrarily and capriciously, the court concluded:

> A landowner's vested rights created by state law may indeed constitute property subject to the arbitrary and capricious substantive due process protections under the federal Constitution.

Id. at 614.

Finally, District of Columbia Circuit precedent also conflicts with the Ninth Circuit. In *Tri County Industries v. District of Columbia*, 104 F.3d 455 (D.C. Cir. 1997), a builder brought a substantive due process claim challenging the District of Columbia's refusal to issue a building permit. The court considered an argument based on *Graham* and *Albright*--that the Takings Clause subsumes a substantive due process claim--but, contrary to the Ninth Circuit, the District of Columbia Circuit flatly rejected that argument and held:

> [I]n this circuit at least, under *Silverman*, the requirements of the takings clause cannot be said to exhaust the Fifth Amendment's substantive protection of property rights from government imposition.

104 F.3d at 459. *Also see Silverman v. Barry*, 845 F.2d 1072 (D.C. Cir. 1988).

B. The Tenth Circuit Agrees with the Ninth Circuit in Not Recognizing Substantive Due Process Protections for Arbitrary and Capricious Actions Affecting Property Interests

In addition to the Ninth Circuit, the Tenth Circuit does not recognize substantive due process protections for property interests. The Tenth Circuit goes beyond the Ninth Circuit, however, and would subsume the Equal Protection Clause into the Takings Clause. In *Bateman v. City of West Bountiful*, 89 F.3d 704 (10th Cir. 1996), a property owner challenged the city's finding of noncompliance with zoning under the Takings, Due Process, and Equal Protection Clauses. The Tenth Circuit relied upon its earlier holding in *Miller v. Campbell County*, 945 F.2d 348, 352-53 (10th Cir. 1991), and this Court's holdings in *Graham* and *Albright,* to conclude that both the substantive due process *and* equal protection claims are subsumed into the Takings Clause.[1]

C. The Fifth and Seventh Circuits Are Inconsistent in Their Recognition of Due Process Protections for Arbitrary and Capricious Actions Affecting Property Interests

Adding to the confusion among the circuits is the position taken by the Seventh Circuit. In *Polenz v. Parrott*, 883 F.2d 551 (7th Cir. 1989), a property owner brought a substantive due process action against two public officials for denial of his liquor license and occupancy permit applications. The circuit court acknowledged a substantive due process claim, but with a caveat:

> [A] substantive due process claim based on a state-created property interest is cognizable

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[1] The Ninth Circuit apparently does not subsume the Equal Protection Clause into the Takings Clause. *Armendariz v. Penman*, 75 F.3d at 1326.

> where a plaintiff claims either a violation of some other substantive constitutional right or that the state law remedies are inadequate.

883 F.2d at 558.

This view of substantive due process property protections is directly contradictory to that of the Ninth Circuit in this case. The Ninth Circuit holds that if a property owner suffers a deprivation of some other constitutional right, such as a taking, the substantive due process protections are subsumed into that right. In contrast, the Seventh Circuit in *Polenz* requires some other constitutional deprivation before it would apply substantive due process protections.

Though it never overruled *Polenz*, the Seventh Circuit has not always adhered to it. *See National Paint & Coatings Association v. City of Chicago,* 45 F.3d 1124, 1129 (7th Cir. 1995) ("[o]nly laws that affect 'fundamental rights' come within the purview of [substantive due process]"). Judge Posner in *Gamble v. Eau Claire County,* 5 F.3d 285 (7th Cir. 1993), suggested that substantive due process review for arbitrary government actions is available even in the absence of the *Polenz* factors. In *Gamble*, a property owner applied to the government for the necessary permits to operate a convenience store, gas station, and repair shop. The county initially approved the application, but then revoked its approval after complaints from the neighbors. The Seventh Circuit rejected the property owner's federal civil rights suit because she failed to pursue her state judicial remedies. In doing so, however, the court noted that there is a difference between a takings claim and a substantive due process claim:

> Statutes or other exertions of governmental power that lack a rational basis, in the sense of some connection however tenuous to some at least minimally plausible conception of the

> public interest, are held to violate due process even if there is no procedural irregularity; so if they deprive someone of life, liberty, or property, they give rise to a claim under the due process clause. When land is taken for a private rather than public use, a rational basis for the government's action, it may be argued, is lacking. The fact that the landowner has an alternate right, one to just compensation, need not be decisive.

5 F.3d at 287 (citations omitted).

At one time, the Fifth Circuit used an approach similar to the Seventh Circuit's approach in *Polenz*. *See Schaper v. City of Huntsville,* 813 F.2d 709, 716-18 (5th Cir. 1987). However, in *FM Properties Operating Company v. City of Austin*, 93 F.3d 167 (5th Cir. 1996), the Fifth Circuit restated the right to be free from arbitrary government action affecting property interests without requiring the violation of some other "fundamental right." The court noted:

> [I]f such government action is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare," [it may] be declared unconstitutional.

Id. at 174.

This conflict among the circuits touches on fundamental rights expressly protected by the Constitution. The exercise of these rights should not depend on where one lives. The citizens of this country are entitled to a consistent application of the law, especially as it pertains to life, liberty, and property. It is time for this Court to address the questions presented in this case and resolve the substantial conflict among the circuits.

II

THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI TO DECIDE WHETHER THE SUBSTANTIVE COMPONENT OF THE DUE PROCESS CLAUSE PROVIDES ANY PROTECTION AGAINST ARBITRARY AND CAPRICIOUS GOVERNMENT ACTION AFFECTING PROPERTY INTERESTS

This Court has never applied *Graham* and *Albright* to preempt substantive due process claims outside of cases involving Fourth Amendment protections against alleged improper law enforcement conduct. Rather, this Court has indicated that *Graham* and *Albright* should be read narrowly. *United States v. Lanier*, 117 S. Ct. 1219, 1228 n.7 (1997). Therefore, under this Court's precedent, outside of law enforcement cases, the general rule of *Soldal v. Cook County*, 506 U.S. 56, 62-63 (1992), should still apply: improper government conduct may be protected under more than one provision of the Constitution.

However, the Ninth Circuit has held that the only constitutional relief property owners have for arbitrary and capricious government regulations which deprive them of their property rights is compensation under the Fifth Amendment Takings Clause. *Macri v. King County,* 110 F.3d at 1499; *Patel v. Penman*, 103 F.3d 868 (9th Cir. 1996); *Armendariz v. Penman*, 75 F.3d at 1325-26; *Sinclair Oil v. County of Santa Barbara*, 96 F.3d 401, 407 (9th Cir. 1996). These cases denied the property owners any relief under the substantive component of the Due Process Clause. What this means to property owners in the Ninth Circuit is that lower federal courts will recognize no constitutional basis to invalidate, enjoin, or award damages for improper government interference with property interests apart from compensation for a taking. Such a position departs

from the textual protection of property in the Fifth and Fourteenth Amendments and from this Court's long-standing recognition of due process protections against arbitrary and capricious government actions. *Village of Euclid v. Ambler Realty*, 272 U.S. 365, 390-95 (1926); *Nectow v. City of Cambridge*, 277 U.S. 183, 188-89 (1928); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981).

A. The Fifth Amendment Remedy of Just Compensation Provides Inadequate Relief for Arbitrary and Capricious Government Land Use Regulations

In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), this Court made clear that the constitutionally required relief for a Takings Clause claim is compensation:

> Consideration of the compensation question must begin with direct reference to the language of the Fifth Amendment, which provides in relevant part that "private property [shall not] be taken for public use, without just compensation." As its language indicates, and as the Court has frequently noted, this provision does not prohibit the taking of private property, but instead places a condition on the exercise of that power. This basic understanding of the Amendment makes clear that it is not designed to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking. Thus, government action that works a taking of property rights necessarily implicates the

> "constitutional obligation to pay just compensation."

482 U.S. at 314 (emphasis in original; citations omitted).

This Court emphasized in *First English* that the purpose of the Takings Clause is to secure compensation in an otherwise "proper" interference with property rights. However, the Takings Clause does not address relief for an "improper" interference with property interests. Under *First English*, once an interference is found, it is up to the government whether to take action to stop that interference or pay compensation:

> Once a court determines that a taking has occurred, the government retains the whole range of options already available--amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain.

482 U.S. at 321.

Accordingly, under *Macri*, a property owner's only constitutional relief for government interference with property interests is through the Takings Clause and the only remedy under the Takings Clause is compensation. Thus, arbitrary and capricious government interference with property interests is constitutionally unrestricted so long as the government pays compensation.

The inadequacy of the compensation remedy can be illustrated by a hypothetical considered by the Seventh Circuit in *Gamble v. Eau Claire County*, 5 F.3d at 286-87: What would be the remedy if a state passed a law which said the governor could take away a person's home and give it to his brother-in-law? Under the Ninth Circuit's position, compensation is the only remedy because the substantive due process claim is merged into the Takings Clause claim. The Ninth Circuit

would find no constitutional prohibition against this arbitrary and capricious governmental conduct.

B. The Plain Text of the Constitution Provides That a State May Not Interfere with Property Interests Without Due Process

The Due Process Clause of the Fourteenth Amendment is similar to the Fifth Amendment and reads: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." This language is clear, due process applies equally to life, liberty, and property. Indeed, property *is* a liberty interest:

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

Lynch v. Household Finance Corporation, 405 U.S. 538, 552 (1972).

Nevertheless, the Ninth Circuit has read the prohibition against deprivation of property without substantive due process out of the Constitution. In *Armendariz v. Penman*, which the Ninth Circuit relied on for its *Macri* decision that a specific constitutional claim preempts a general constitutional claim, the plaintiffs alleged a government scheme to deprive them of their property so a shopping center developer could acquire it.

75 F.3d at 1321. In effect, the plaintiffs argued their property was not being taken for a public purpose, but for a private purpose. The Takings Clause prohibits takings for a public use or purpose without compensation. In order to fit the plaintiffs' claim within the Takings Clause, however, the Ninth Circuit had to read the "public purpose" limitation out.

One commentator stated that the Ninth Circuit's approach is now to

> tear constitutional provisions free of their textual moorings in order to shoehorn generalized claims into specific constitutional guarantees.

Krotoszynski, *Fundamental Property Rights*, 85 Geo. L.J. at 574.

It is more than a little ironic that the purpose behind the *Armendariz* preemption rule is to prevent resort to open-ended review under the Due Process Clause without textual guideposts. 75 F.3d at 1319. The Ninth Circuit's "shoehorn" approach is potentially even more open-ended than substantive due process review. As Professor Krotozynski states:

> Whatever dangers may be associated with substantive due process review of economic regulation [they] are no more (and arguably less) serious than the dangers posed by the loose form of antitextual interpretivism recommended by *Armendariz*.

Krotoszynski, *Fundamental Property Rights*, 85 Geo. L.J. at 574.

The Due Process Clause was included in the Bill of Rights and the Fourteenth Amendment to provide citizens express protection of rights in the ownership of property. But Alexander Hamilton recognized the natural tendency of those

in power to read too much or too little into express constitutional language and so opposed adoption of an enumerated Bill of Rights:

> I go further, and affirm that bills of rights . . . are not only unnecessary in the proposed constitution, but would even be dangerous.

The Federalist No. 84 (Alexander Hamilton).

As Hamilton saw it, the basis for this danger lay in the risk that specific constitutional protections would be read, like the Ninth Circuit did in this case, to limit the rights retained by the people rather than as a constraint on the activities of government. Hamilton argued a bill of rights

> would contain various exceptions to powers which are not granted; and on this very account, would afford a colourable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?

Id.

Whatever other constitutional rights citizens enjoy, they have a legitimate (and constitutionally cognizable) interest in being free from arbitrary and capricious government action. *See* Krotoszynski, *Fundamental Property Rights*, 85 Geo. L.J. at 577 (citing Judge Kozinski's opinion in *Sinaloa Lake Owners Association v. City of Simi Valley*, 882 F.2d 1398). The impetus for the American Revolution was to rid the people of the despotism of arbitrary government. To those who pledged their lives, fortunes, and sacred honor to declare their independence, the concepts of life, liberty, and property were not mere abstractions. These revolutionaries saw first hand the consequences of a government that could kill or imprison its citizens and rob the people of their property at will. But to secure the blessings of liberty to their posterity, the Framers of

the Constitution required due process of law. Now, the Ninth Circuit has found a pretext to claim that property rights are protected only by the more narrow Takings Clause of the Fifth Amendment and not by the full weight of the Due Process Clause expressly included in the Fifth and Fourteenth Amendments.

Nothing in the language of the Constitution or in its historical underpinnings suggests that the specific constitutional protection of the Takings Clause addresses the same individual rights as the more general protection of the Due Process Clause. It is axiomatic that the Bill of Rights constitutes a list of *minimum* constitutional protections, not the *maximum*--as the Ninth Circuit seems to suppose. On its face, the Fifth Amendment contemplates two separate protections for property: (1) no person shall be "deprived of life, liberty, or property, without due process of law"; and (2) "nor shall private property be taken for public use without just compensation." The Ninth Circuit seeks to excise an express provision of both the Fifth and Fourteenth Amendments because it finds protection of personal rights in property ownership through both substantive due process and the Takings Clause redundant. However, the two provisions address different concepts of individual rights.

The reference in the Takings Clause to property taken for "public use" suggests that the government may "take" property and pay compensation only for a legitimate governmental purpose. In contrast, when the government interferes with a property interest in an arbitrary and capricious manner, even if it pays, the Due Process Clause should operate to invalidate the action. These clauses are not mutually exclusive. Rather, they provide complementary protections of a broad range of individual rights enjoyed by property owners.

In its decision below, the Ninth Circuit remarks that it had a concern in *Armendariz* for a "loophole" in takings law regarding the ripeness doctrine:

> Namely, by presenting essentially a takings claim under the claim of substantive due process, plaintiffs were able to avoid the ripeness requirements of *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L. Ed.2d 126 (1985). It is axiomatic that a takings violation is not complete until the plaintiff has sought compensation through state remedies and been denied, whereas a substantive due process violation is complete as soon as the government action occurs.

Macri, 110 F.3d at 1499.

What the court characterizes as a "loophole" is simply a correct statement of constitutional jurisprudence. When the government acts arbitrarily to deprive landowners of their property, those landowners *should* be able to rely on the express provisions of the Fifth and Fourteenth Amendments and seek redress for both the arbitrary action and any loss of property rights.

Under Ninth Circuit jurisprudence, the government is not prohibited from acting arbitrarily or capriciously with respect to individual rights in property. Relying on the "whole range of options" available under the Takings Clause, the state may buy its way out of this constitutional obligation. According to the Ninth Circuit, while the government can exercise this "whole range of options," the property owner's only remedy is a forced sale of his property. But this remedy simply does not address the landowners' constitutional right as expressed in the

Due Process Clause and inherent in the Constitution to be free from arbitrary governmental action.

The general rule, that a plaintiff can seek relief under multiple constitutional theories, is the only rule that squares with the express language of the Constitution and the clear intent of the Framers. The Ninth Circuit's exception to this rule for arbitrary actions restricting the use and enjoyment of property disparages a fundamental protection of individual liberty expressly stated in the Fifth and Fourteenth Amendments.

C. This Court Has Consistently Found a Constitutional Right Based on the Due Process Clause to Be Free from Arbitrary Government Actions

This Court has consistently applied a substantive due process rule protecting property owners. It has applied this rule in land use cases even though a takings claim could have been considered along with a substantive due process claim.

> [I]t must be said before the [zoning] ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.

Village of Euclid v. Ambler Realty, 272 U.S. at 395. *Also see Nectow v. City of Cambridge,* 277 U.S. at 187-88:

> We quite agree with the opinion expressed below that a court should not set aside the determination of public officers in such a matter [relative to a zoning ordinance] unless it is clear that their action "has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the

> public health, the public morals, the public safety or the public welfare in its proper sense."

This Court has noted in other cases that a landowner has a "right to be free of arbitrary or irrational zoning actions." *See Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 263 (1977). *See also Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594-95 (1962).

But the Ninth Circuit has carved out an exception to these protections for individual rights in property based on an erroneous extension of this Court's law enforcement rulings in *Graham* and *Albright*. That exception, in effect, is that government is free to act in an arbitrary manner with property owners as long as it pays just compensation for a resulting loss of constitutionally protected rights in the property. That exception is contrary to the precedent of this Court and should be overturned.

CONCLUSION

The Ninth Circuit has applied this Court's rulings in *Graham* and *Albright* to destroy substantive due process protections for property interests. In so doing, the Ninth Circuit has created an additional irreconcilable conflict among the circuits. The Ninth and Tenth Circuits stand on one side of the issue while the Third, Sixth, Eleventh, and District of Columbia Circuits, as well as, arguably, the Fifth and Seventh Circuits, stand on the other side. Only this Court can reconcile this conflict.

Moreover, the Ninth Circuit's ruling is contrary to long-standing practices of this Court and in contravention of the express text of the Constitution which plainly prohibits government deprivation of property interests without full due process of law.

Therefore, amici curiae respectfully urge this Court to grant the petition for writ of certiorari and reverse the judgment of the Ninth Circuit Court of Appeals.

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Respectfully submitted,

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